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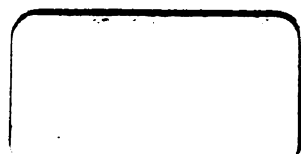
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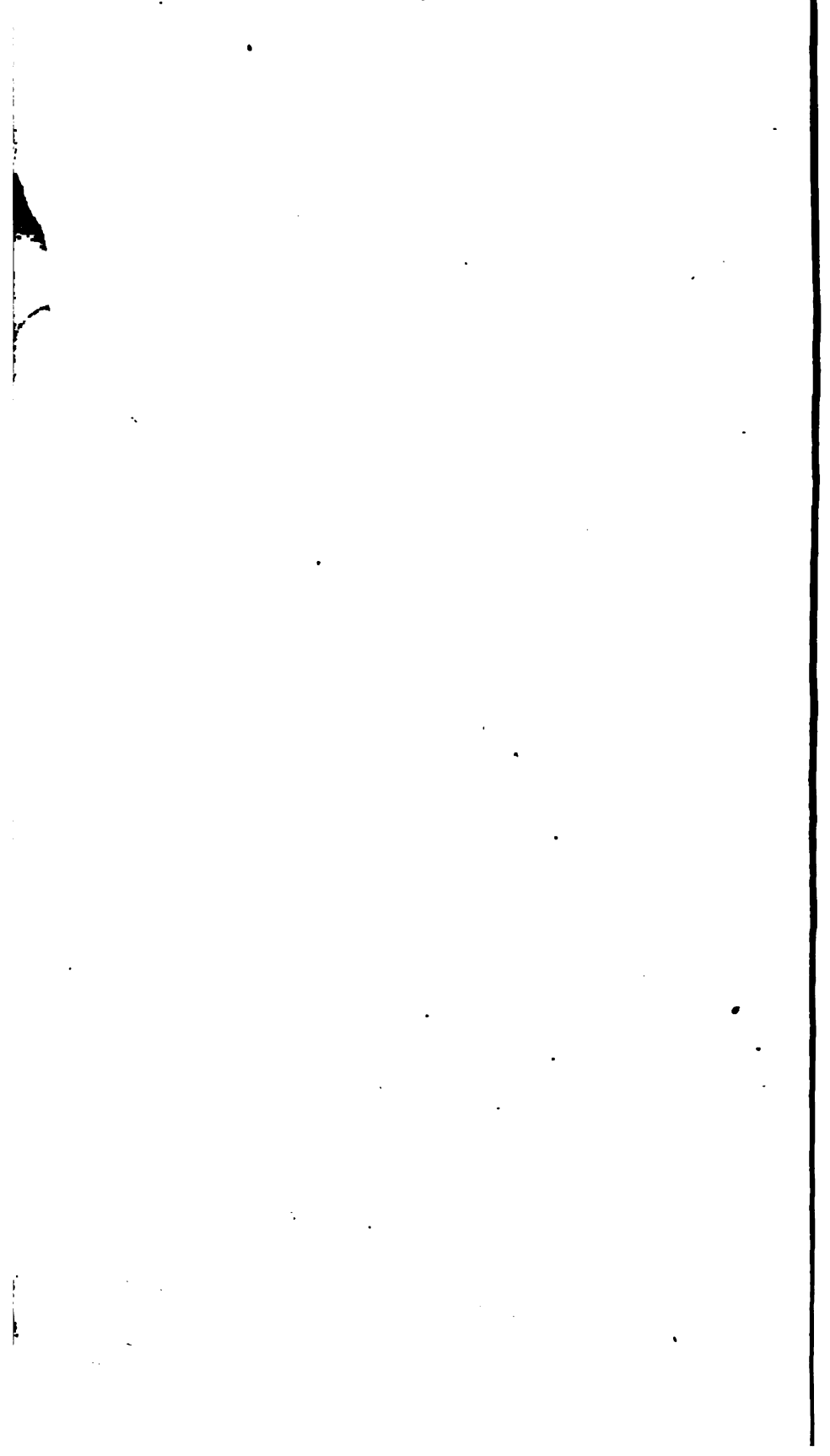




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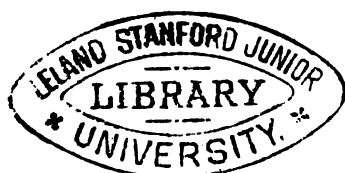
A COLLECTION OF ALL THE  
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA  
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VOL. XXI

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## BLOCK

v.

### ERIE AND NORTH SHORE DESPATCH FAST FREIGHT LINE.

(*Advance Case, Massachusetts. May, 1885.*)

Several railway companies forming a fast freight line are partners liable jointly and severally for goods lost or damaged in transportation by such line.

By a bill of lading "The Erie & North Shore Despatch" contracted to carry plaintiff's goods from Boston by the Fitchburg Railroad and thence by the Erie & North Shore Despatch to Chicago, and then to deliver them to connecting railroad lines to be forwarded to Denver, their destination—not naming the several railroad companies forming the association, but providing that in case of loss or damage of the goods "that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening thereof."

*Held*, that the words "that company" referred only to the companies named in the contract, and that plaintiff need not sue the member of the Despatch Line on whose road the goods were lost, the Despatch Company being liable as a partnership.

*Linus M. Child* for plaintiff.

*Sohier & Welch* for defendant.

MORTON, C. J.—The evidence at the trial tended to show that the several defendant corporations formed an association or company under the name of "The Erie & North Shore Despatch," for the transportation of merchandise between Boston and Chicago; that the association had an agent in Boston who was authorized to receive goods at Boston for transportation over the line to Chicago, and to give bills of lading or contracts for transportation like the one upon which the plaintiff sues; that the plaintiff delivered goods to such agent, and received the bill of lading in suit; and that a part of the goods were lost between Boston and Chicago. By the bill of lading, "The Erie & North Shore Despatch" contracts to carry the goods from Boston by the Fitchburg Railroad, and thence by the Erie & North Shore Despatch to Chicago, and then to deliver them to connecting railroad lines to be forwarded to Denver, their destination. The several railroad companies which form the association are not named in the contract. It is a single and indivisible contract, by which the Erie & North Shore Despatch Line agrees to carry the goods to Chicago, the

## 2 BLOCK V. E. AND N. S. DESPATCH FAST FREIGHT LINE.

freight to be earned upon the delivery there to the connecting line. So far as the question in this case is concerned, it is unlike those cases where a railroad forming one link in a line of connecting roads between two points receives goods to be transported over its line and delivered to the connecting road, in which it has been held in this commonwealth that each railroad in the continuous line is liable only for loss or damage happening on its own road. *Darling v. Boston & W. R. Co.*, 11 Allen, 295; *Gass v. New York, P. & B. R. Co.*, 99 Mass. 220; *Burroughs v. Norwich & W. R. Co.*, 100 Mass. 26; *Aigen v. Boston & M. R. R.*, 132 Mass. 423; s. c., 6 Am. & Eng. R. R. Cas. 426.

The defendants formed a company, and in its name made a special contract to carry the plaintiff's goods from Boston to Chicago. They are, so far as the plaintiff is concerned,

FAST FREIGHT  
LINE IS A PART-  
NERSHIP.

partners, and liable jointly and severally for any loss or damage to his goods between Boston and Chicago, unless they are exempted from liability by the terms of the contract. *Hill Mfg. Co. v. Boston & L. R. Co.*, 104 Mass. 122. The principal difficulty in this case is as to the true construction of the contract of carriage. It contains the provision that in case of loss or damage to the property received, "whereby any legal liability or responsibility shall or may be incurred, that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening thereof." It also contains a provision that, in case of loss or damage of any of the goods "for which either of said companies may be liable, it is agreed that said company shall have the benefit of any insurance effected thereon by the owner." The defendants contend that the expression "that company," in the clause above cited, means that railroad company

BILL OF LADING  
CONSTRUED.

in any part of the continuous line between Boston and Denver, so that, although the plaintiff's loss occurred between Boston and Chicago, that railroad company in whose custody the goods were when lost, is alone liable. This is not the necessary, and we do not think it the fair, construction of the defendant's contract. By it the Erie & North Shore Despatch, as a company, undertake to carry the goods to Chicago, and there to deliver them to a connecting line. The several railroads which constitute this company are not named or referred to in the contract. It is in the same terms as if the Erie & North Shore Despatch had been a single railroad corporation, with a road from Boston to Chicago. In other parts of the contract the expressions "this company" and "said company" are used in connections which clearly show that they refer to the defendant company, and not to any railroad company between Boston and Chicago. Thus, there is the provision that it is "agreed that the Erie & North Shore Despatch will not be liable for loss or damage or delays to the above goods on any river or lake;" and "said company will

not be liable for any loss" by guerrillas or military seizures. So there is the provision that, "in consideration that this company has reduced the price of such transportation below the local rates, the shipper and owner does hereby release the Erie & North Shore Despatch, and the steam-boat and railroad company which may receive said property, from liability for breakage," etc. In these clauses the word "company" clearly refers only to the defendant company, and the connecting company or companies between Chicago and Denver.

The words "said company" or "said companies," used in the clause as to insurance, and other places, by their natural interpretation refer to companies which have previously been named. We cannot see why the words "that company," in the clause we are considering, should receive a different construction from that given to equivalent or similar words in other parts of the contract. The plaintiff was dealing with the defendant company alone for the transportation as far as Chicago. He did not know the parties who composed that company, and entered into no separate contract with either of them. He had the right to interpret the words "that company" as meaning the defendant company, and not a railway company nowhere named in his contract. The effect of this interpretation is, what seems to have been in the minds of the parties, to release the defendant company from liability after it had carried the goods to the end of its route, according to its contract, and had delivered them to the connecting carrier, and to hold it liable to the point to which it had assumed and contracted to transport the goods as a common carrier.

We are of opinion that this is the fair construction of the contract, and therefore that the learned justice who presided at the trial in the superior court erred in directing a verdict for the defendants. Exceptions sustained.

**Railway Partnerships and Fast Freight Lines.**—The principal case suggests several interesting subjects for consideration.

**I. CONNECTING RAILWAYS HELD NOT COPARTNERS.**—"Arrangements are often made," said Mr. Justice Comstock in *Merrick v. Gordon*, 20 N. Y. 96, "between different companies having lines which connect, adjusting fare or freight on passengers and goods between distant points, and assigning to each a share in the gross earnings according to the service which each performs in producing the result. No case has gone the length of holding that an agreement of this nature creates a partnership; and if we were to lay down such a doctrine now it would be establishing a class of partnerships hitherto unknown to the law." This was said in a case where a firm, carriers upon the New York canals, agreed with a firm of carriers upon the Great Lakes for a division in fixed proportions of the total freight which should be received for the carriage of goods over both firms' routes, and it was decided that this did not constitute them partners. The principle of this case, although enunciated a quarter of a century ago, is sustained by many authorities and is still the law.

**ILLUSTRATIVE CASES.** "GREEN LINE." **NO ESTOPPEL.**—There was an

#### 4 BLOCK O. E. AND N. S. DESPATCH FAST FREIGHT LINE.

arrangement between different railroads connecting with each other whereby each road agreed to carry the cars of the others having the name "Green Line" painted thereon over its own road without breakage of bulk, at such rates as might be agreed on, each company fixing its own rates of freight passing over its own road and collecting the same as the freight passed over its road and having no interest in freights not reaching its road. Each road being desirous of making a through rate over other roads via these "Green Line" cars, would ascertain the rates the intermediate road or roads charged, and adding the same to its own rates, fix its own schedule of through rates, which it termed "Green Line Rates." There was no joint expense, loss or profits except that where a loss could not be located on any particular road a *pro rata* share of the loss was borne by all that carried the freight. It was decided that there was no partnership and that the railway company was not estopped from denying that there was any partnership by the fact that the words "Green Line" were painted on the roof of a wharf boat, and printed also upon the bills of lading. *Irvin v. Nash, Chat. & St. L. R. Co., 92 Ill. 108.* That an agreement to share *pro rata* losses that cannot be located does not make the connecting carrier partners see *Aigen v. Boston & M. R. R. Co., 182 Mass. 428; s. c., 6 Am. & Eng. R. R. Cas. 426.* See *Schiff v. N. Y. Cent. & Hudson Riv. R. R. Co., 16 Hun, 278.*

**SAME. ADVANCING CHARGES.**—Another arrangement very common among railway companies is this: several connecting railway companies form a "through-line," agreeing that when goods are received to be carried over the whole route they shall be delivered by each to the next succeeding company, which shall "advance charges" thereupon; that is, pay to its predecessor the amount already due for the carriage, the last company collecting the whole from the consignee. This does not constitute the companies partners, nor make the last company liable for goods lost or injured before it received them. *Darling v. Bost. & Wor. R. Co., 11 Allen, 295; Hot Springs R. R. v. Trippe, 42 Ark. 465; s. c., 18 Am. & Eng. R. R. Cas. 562.*

**SAME. THROUGH-TICKETS.**—An arrangement the converse of that last described exists where several companies constitute a through-line and each sells "through-tickets," deducting its own share of the price paid for the same and accounting to the other companies for their share, the price being fixed according to a tariff fixed by each company as to its own road. This does not constitute the companies partners. *Croft v. Balt. & O. R. Co., 1 McArth. 492; S. P. Straiton v. N. Y. & N. H. R. Co., 2 E. D. Smith, 184.* See also *Converse v. Nor. & N. Y. Trans. Co., 33 Conn. 167; Harton v. Eastern R. Co., 114 Mass. 44; Ellsworth v. Tartt., 26 Ala. 788.*

**SAME. SEVERAL COMPANIES CONTRACTING WITH DESPATCH LINE NOT PARTNERS.**—A contract between A, a despatch company, and B, a railroad company, whose road, in connection with those of other companies, forms a continuous line, stipulated that B should "receive, load, and unload, deliver and way bill" all freight sent to it by A at such rates for transportation as may be established by the railroad companies, and should, while assuming all the risks of a common carrier, pay for all damage to or loss of property while on its road or in its possession. A similar contract was entered into by A with each of the other companies, between which there was an arrangement that the amount charged for the through-freight should be divided between them according to the length of their respective roads; and that on such freight the last carrier should collect the charges from the consignee, deduct its share thereof, account in the same way to the next company, and so on to the first. Settlements were made by the railroad companies periodically upon accountings between them, and each settled separately with A. *Held*—1. That B by its agreement with A incurred neither an obligation to carry freight beyond its own road nor a liability for the negligence of either of the other companies. 2. That the arrangement between the railroad

companies did not make them partners *inter sese* or as to third persons. Insurance Co. v. Railroad Co., 104 U. S. 146; s. c., 8 Am. & Eng. R. R. Cas. 260.

And in an action against a common carrier seeking to hold it liable as a partner of another road by which the goods were shipped, the mere facts that such roads are continuous, and that an association engaged in shipping goods between points connected by these roads and using its own cars, and employing agents distinct from those of these roads, was in the habit of giving through-bills of lading between these points, and distributing the freight received among the roads actually engaged in the carriage, in proportion to the freight earned by each road, is not evidence of a partnership between the roads, or that the shipping association in question made the contract of affreightment in question as agent of the defendant. Watkins v. Terre H. & I. R. Co., 8 Mo. App. 569; s. c., Am. & Eng. R. R. Cas. 614.

**SAME. REASONS WHY NO PARTNERSHIP.**—The reasons why there was held to be no partnership in the foregoing cases are very obvious. Although in some of the cases the companies were doing business through a common agent, Ellsworth v. Tartt., 26 Ala. 733; Straitton v. N. Y. & N. H. R. Co., 2 E. D. Smith (N. Y.), 184; Watkins v. Terre H. & I. R. Co., 8 Mo. App. 569; s. c., 1 Am. & Eng. R. R. Cas. 614, or were regulating parts of their business by a joint committee, Straitton v. N. Y. & N. H. R. Co., 2 E. D. Smith, 184, there was in fact no joint expense, no joint property, no joint fund, no joint profits, and no arrangement to share loss and profit. A communion of profit is of the very essence of the contract of partnership, and without this communion of profit a partnership cannot in law exist. Irvin v. Nash., Chat. & St. L. R. Co., 92 Ill. 103.

Cases holding that through freight lines composed of connecting railroad corporations are partnerships involve the question of the authority of the corporations to form such partnership. It seems well settled that connecting railroad companies have no authority under their charters to form a partnership arrangement for the joint management of the two roads, and a division of profit and losses. The charter authorizes the company to manage and control its own road, and that alone, and that it must govern and control without the intervention or co-operation of any other railroad. Burke v. Concord R. Co., 8 Am. & Eng. R. R. Cas. 552; Pearce v. Mad. & Ind. R. C. & Peru & Ind. R. Co., 21 How. 441; see also Bissell v. Mich. South. & North. Ind. R. Co., 22 N. Y. 259. But through-freight-line partnerships involve considerations somewhat different from those involved in the cases just cited. Such a partnership does not involve a joint management of the road. The management of each road is kept entirely distinct and is not affected by the partnership arrangement. The partnership relates only to through business, and each road contributes to the partnership its services as a carrier over its line. It is objected that a railroad has no authority under its charter to assume a liability for the defaults or torts of another road, but it seems well settled that a road may contract for the carriage of goods or passengers beyond its own termini. Nashua Lock Co. v. Worc. & Nashua R. Co., 48 N. H. 339; Stewart v. Erie & West. Transp. Co., 17 Minn. 372.

**II. RAILWAYS HELD COPARTNERS.**—But different views from those advanced in the foregoing cases are taken by other courts, holding that if several carriers, having each its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price, which the shipper or consignee pays in one sum, and which the carriers divide among them, then, as to third parties with whom they contract they are liable jointly for a loss taking place on any part of the whole line. Barton v. Wheeler, 49 N. H. 25; Bradford v. Railroad Co., 7 Rich. 201; Cincinnati etc. R. Co. v. Spratt, 2 Duval, 4; Nashua Lock Co. v. Railroad Co., 48 N. H. 339; Quimby v. Vanderbilt, 17 N. Y. 306; Chouteaux v. Leach, 18 Pa. St. 224; Boston, etc., Steamboat Co. v. Brown, 54 Pa. St. 77; Hart v. Railroad Co.,

4 Seld. 37; Railroad Co. *v.* Androscoggin Mills, 23 Wall, 594; Railroad Co. *v.* Pratt, 22 Wall, 123; Wyman *v.* Chic. & Alton R. Co., 4 Mo. App. 39; Erie & Pac. Despatch *v.* Cecil, 112 Ill. 180; Rice *v.* I. & St. L. R. Co., 3 Mo. App. 31; Coates *v.* U. S. Ex. Co., 45 Mo. 238; Barter *v.* Wheeler, 40 N. H. 11; Bostwick *v.* Champion, 11 Wend. 571.

CONSTRUCTION OF BILL OF LADING.—In a New York case the bill of lading was as follows: Great American "Red Line" Route from the Atlantic to the Pacific Ocean without change of cars.

By arrangement between the following railroad companies, viz.: Boston & Albany R. R., Providence & Nashua R. R., Housatonic R. R., Worcester & Nashua R. R., N. Y. Central & Hudson River R. R., Lake Shore & Mich. Southern Ry.

NEW YORK, June 27, 1872.

Received from Schiff & Clark the following package in apparent good order, contents and value unknown: . . . To be transported over the line and delivered in like good order to the consignee or owner at St. Joseph, or to the next company or carriers (if the same are to be forwarded beyond) for them to deliver to the place of destination of said goods or package, it being distinctly understood that these companies shall not be responsible as common carriers of said goods while at any of their stations awaiting delivery to such consignee or carriers, the companies being liable as warehousemen only.

C. V. CROSS,  
N. Y. Agent.

The goods were shipped from New York City to St. Joseph, and were damaged by the default of the Lake Shore & Mich. Southern R. R. after the goods had passed over the line of the N. Y. Cent. & Hudson River R. R. Co., the defendants. It was *held* that the defendants were exonerated from liability by the express words of the bill of lading: that the bill of lading provided that the responsibility of each carrier composing the "Red Line" should terminate on the delivery of the freight to the next carrier. Schiff *v.* N. Y. Cent. & Hud. Riv. R. R. Co., 16 Hun, 278.

## RAILROAD COMMISSION OF MISSISSIPPI *v.* YAZOO AND MISSISSIPPI VALLEY R. R. Co.

*SAME v. NATCHÉZ, JACKSON, AND COLUMBUS R. R. Co.*

(*Advance Cases, Mississippi.* 1885.)

The law of Mississippi appointing a railroad commission is not unconstitutional. Said commission has no power to oblige railroad companies to charge no higher rates of freight and fare than they are allowed by their charter to charge, even though such companies may be engaged in interstate commerce.

CAMPBELL, C. J.—It is claimed that the act creating the Railroad Commission is a violation of article 1, section 8 of the Constitution of the United States, which vests in Congress power "to regulate commerce . . . among the several States," because the railroad of the appellee connects at Jackson, Mississippi, with

the railroad system of the country, and at Yazoo City with the waterways, and its interstate and local commerce and interests are inseparable without ruin. The question thus presented is, how far is the State disabled, by the constitutional provision quoted, from governing railroads within its limits as to fares and freights?

There is no denial of the power of Congress "to regulate commerce . . . among the several States," for that is plainly conferred, but what is it to regulate commerce? Prescribing rates of compensation for service rendered by a railway company does not appear to us to be regulating commerce. The right to compensation is an essential attribute of such a corporation. It is the power to exist. Prescribing rates is providing for the existence of the artificial being. It is breathing into it the breath of life, that it may become a living being. The power to do this belongs to the sovereignty that may create corporations, and shape their being, and define their functions. It must be the State. Its power to create corporations for the various purposes of business and commerce has been uniformly exercised and never questioned. If it may create such corporations, it may determine their attributes and prescribe what they may charge for services rendered as well as the other conditions of their existence. This belongs to sovereignty of the State and is essential to the regulation of its internal police, and has not been surrendered to Congress. *People v. Babcock*, 11 Wend. 587; *Freeholders v. The State*, 4 Zabriskee, 718. It is the sovereign power to govern the institutions of the State, and it is not regulating commerce. It would seem to belong to the State alone, whose creature the corporation is, and whose right to shape its being in this essential attribute pertains to it, because it is its creator; and such we understand to be the doctrine of the Supreme Court of the U. S. as announced in *Railroad Co. v. Maryland*, 21 Wall. 456, and other decisions.

The principle supporting the decision in *Railroad Co. v. Maryland* is the right of a State, as a sovereign, to regulate and control the rate of transportation over its creature—the railroad built under a charter by the State. It is recognized by the opinion of the court that, in the very nature of things, the State must have control of the rates over highways of its own creation, even though to exercise this power involves consequentially an imposition on persons and property carried from State to State. The railroad extended from Baltimore to Washington, and the State required payment to it of a fixed portion on all money derived by the company from carrying passengers from Baltimore to Washington City, and the question was whether this exaction by the State in the charter of the company was "a restriction of free intercourse and traffic between the different States;" and it was declared not to be such. The plain assumption was that, unless the provision in the charter was a restriction of free inter-

PREScribing  
RATES IS NOT A  
REGULATION OF  
COMMERCE.

STATE MAY CON-  
TROL RATES.  
RAILROAD CO. V.  
MARYLAND EX-  
AMINED.

course and traffic it was clearly within the legitimate power of the State. It was said by the court "that the power to charge for transportation and the amount of the charge are absolutely within the control of the State," and "this unlimited right of the State to charge, or authorize others to charge, toll, freights of fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation." Attention was called by the opinion to the fact that when the Constitution was adopted transportation on land was performed entirely on common roads, and in vehicles drawn by animal power, and that "no one at that day imagined that the roads and bridges (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control. They were all made either by the States or under their authority. The power of the State to impose or authorize such tolls as it saw fit was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to National regulation. The movement of persons and merchandise, so long as it was as free to one person as to another, to the citizens of other States as to the citizens of the State in which it was performed, was not regarded as unconstitutionally restricted, and trammelled, by tolls exacted on bridges or turnpikes, whether belonging to the State or to private persons."

There is far more reason for denying authority to the State and claiming it for Congress, as to the common roads which cross State lines, than as to railroads. They are much more numerous than railroads. Their freedom from restriction is more important as affecting commerce on the borders of States than the freedom of railroads.

So in *Hall v. De Cuir*, 95 U. S. 485, the statute of Louisiana requiring common carriers of passengers to give all persons travelling in that State upon the public conveyances employed in such business equal rights and privileges in all parts of the conveyance without distinction or discrimination on account of race or color, was held to be a regulation of commerce, and void, even within the State, so far as it affected vessels plying the waters of the Mississippi River between different States. The reason was, the steamboat was enrolled, and licensed under the laws of the United States, and engaged as a regular packet between different States upon the navigable waters of the United States. The vessel was, in a sense, an institution of the United States, and navigating the National highway common to all, and not the property of private persons, or deriving its existence from a State. As Congress had regulated the business by providing for licensing vessels, and leav-

COMMON ROADS  
AND RAILROADS  
COMPARED.  
HALL v. DE CUIR  
EXAMINED.



ing the licensee free and untrammelled as to the accommodations of passengers, and as by the common law it pertains to the business of a common carrier to make reasonable and suitable regulations as regards passengers, it was held that Louisiana had no right to add a requirement not imposed by Congress, which in regulating the matter had left the common law in force as to this. As it belonged to Congress to legislate on this matter, and it had done so, the action of the State was unauthorized, and void, wherein it added to the requirements of Congress. Under the acts of Congress and the common law with reference to which they were enacted, the licensed carrier might adopt its own reasonable regulations for the accommodation of passengers. The statute of Louisiana abridged this right, and hindered its free exercise. It violated the privilege of a grantee of the United States, and therefore was declared to be of no effect. This seems to us the true foundation of that decision. It was said by the Chief Justice, in delivering the opinion, that "State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress." We adopt this view, and hold that even in prescribing rates of compensation, which pertains exclusively to the State authority, as we believe, if a direct burden was laid upon interstate commerce, or a direct interference with its freedom was attempted, it would necessarily fail because of the absence of power in a State, in view of the constitution of the United States, to obstruct the freedom of commerce among the States.

Our view is that the State may regulate rates, but cannot, in the exercise of this power, obstruct the freedom of commerce among the several States.

In the opinion cited a distinction is drawn between acting "upon the business through the local instruments to be employed, after coming within the State," and acting "directly upon the business as it comes into the State from without or goes out from within." This seems to be a full recognition of the distinction we have endeavored to draw between the local instruments of commerce existing by authority of a State and within its limits, and the commerce which may be carried on over them. Grant that wherever commerce goes, whether by land or on water, the power of Congress goes to secure its freedom from hindrance or discrimination by State authority, and it still remains true that the local instrument and vehicle of commerce, deriving its being from the authority of the State, is subject to its regulation, in the essential attribute of earning a support, and continuing to perform its functions, and accomplish the end of its creation; and that the only limitation of the power of the State with reference to commerce among the States is to abstain from any obstruction of its freedom, or any burden upon it.

STATE CANNOT  
OBSTRUCT COM-  
MERCE.

DISTINCTION BE-  
TWEEN COM-  
MERCE AND IN-  
STRUMENTS  
THEREOF.

It may be conceded that State law requiring companies to give equal accommodations on cars going from State to State to all passengers would fall under the condemnation of the decision in *Hall v. De Cuir*, and it would not follow that State regulation of compensation for service must be denied; for there is a wide difference between the exercise of the right to live and act, and those collateral matters which do not relate to the very existence of a being, but to the mere convenience.

Congress has not regulated railroads. They do not owe their existence to Congress. They do not operate by its license. They are State institutions, and subject to State authority, in subordination to the constitutional inhibition of any restriction by the State of the freedom of commerce among the several States; not absolute freedom, but such freedom as makes no distinction between the rights of person and things because of locality. The Constitutional provision being considered, was designed to prevent each State from legislating with reference to its own interests, regardless of the interests of others. It should be so construed as to accomplish this end, and should be limited to that.

*Pensacola Telegraph Co. v. West*, 96 U. S. 1, was decided on the principle that a State may not obstruct or unnecessarily encumber an instrumentality of commerce, and of government authorized by it.

In *Lord v. Steamship Co.*, 102 U. S., 541, the act of Congress limiting the liability of the owner of any vessel navigating the high seas between parts of the same State, in certain cases specified in the act, was upheld as a valid exercise of the power of Congress to regulate commerce. In delivering the opinion the Chief Justice lays stress on the fact that the vessel, on her voyages between the parts of the State, entered on a navigation which was necessarily connected with other nations, because she went out of California and the United States, and upon the ocean—the common property of all nations.

What analogy is there between a vessel navigating the ocean, and a railroad situate wholly within a State, but connecting at the State line with a railroad in another State? Does it arise from the fact that these connecting roads afford a track for trains of cars to be drawn from State to State? While the train is in one State it is subject to its jurisdiction. The instant the State boundary is crossed the jurisdiction of another State attaches. The right of each State to govern within its limits must be upheld. This right to govern is limited only by the Constitution of the State, and of the United States. The contention now being examined is that government by the State, within its limits, of such

RAILWAYS ARE  
STATE INSTITU-  
TIONS.

AUTHORITIES  
EXAMINED.

ANALOGY BE-  
TWEEN VESSEL  
AND RAILWAY.

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GOVERN WITHIN  
ITS LIMITS—AU-  
THORITIES.

railroads, is denied, because Congress has power to regulate commerce among the several States. The reply is that the <sup>AUTHORITIES.</sup> local instrument or vehicle of commerce existing in the State by its authority, including the trains while in the State, are subject to all such regulations adopted by the State for their government as are not in their nature and effect an imposition upon or a hindrance of free intercourse and traffic between the States. The State cannot, in regulating rates or in any other manner, discriminate against persons or products of other States or counties, but it may govern all within its limits impartially and justly. In the State, cars and cargo and passengers are amenable to its laws, although they will soon become subject to the laws of another State, which possesses like power of control over them, subject to the Constitutional restriction against burdening or hindering commerce. Any unauthorized restriction would fall by the silent operation of the Constitution of the United States made effective through the courts; and it may be admitted that Congress could lawfully legislate on this matter, to the extent necessary in its judgment to smooth the way of commerce carried on over railroads from State to State, as many contend, and still it would not follow that Congress can fix the rates of compensation for carriage in a State.

In *Telegraph Co. v. Texas*, 105 U. S. 460, it was decided that the business of a railroad or telegraph company "is commerce itself," and that a tax by the State for each message sent was unlawful as an imposition on messages sent beyond the State. But that is a widely different question from that of the right of a State to deal with the earning capacity of individuals or corporations.

Commerce among the different States must be free; not free from the cost of service, not to go without paying its way; but free from impositions on it, the necessary effect of which is to hinder it.

In *Munn v. Illinois*, 94 U. S. 113, it was decided that the regulation of warehouses for the storage of grain, owned by private individuals, and situated in Illinois, although "used as instruments by those engaged in interstate commerce," was a thing of domestic concern, and pertained to the State. The warehouses were declared to be no more a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. This utterance was as to the effect of the power of Congress to regulate commerce, and it is observable that the distinguished judge who delivered a dissenting opinion in that case did not place his dissent on the ground that Congress had the power to regulate the storage of grain in the warehouses.

This decision affirms the right of the State to regulate the business of one engaged in a public employment in that State, although that business consisted in storing

STATE MAY REG-  
ULATE PUBLIC  
EMPLOYMENT  
AND ESPECIALLY  
CORPORATIONS  
ENGAGED IN IT.

and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

The regulation of a public employment conducted in a State by natural persons belongs to the State in whose jurisdiction they are. There can be no distinction between natural and artificial persons except this: Natural persons possess rights not conferred by the State, while corporations depend on the act of their creation for their rights and powers. They must exist and act as made by the authority which brings them into being.

The State being the creator of a corporation must determine its attributes and functions, and it must, from the necessity of the case, act in obedience to the law of its being.

The State may not invade the domain of Congress, and regulate commerce among the several States, in creating corporations, any more than in any other way; but as it is for the State to create corporations, and as they cannot live without earning money, the power to earn it, and the limit of their right in this respect, must be subject to the regulation of the authority of the State; because it is not regulating commerce, it is incidentally or consequentially affecting it, perhaps; but to deal with the local instrument of commerce, in a matter vital to its existence, is not regulating commerce in the sense of the Constitution. It is providing for the very being of the corporation, just as the State protects the natural person in the enjoyments of all his rights.

Congress has supreme, and, it may be conceded, exclusive power over commerce among the several States; and any attempt of the State to regulate this commerce, or to fetter, or burden, or restrict it in any way, is unconstitutional. But it is not everything which may incidentally or consequentially affect this commerce which is to be held void. A regulation of interstate commerce, as such, is prohibited; but power may be legitimately exercised by the State, in many ways, over the instruments of commerce among the States, and not be justly condemned. So long as there is no discrimination against persons and things carried across State lines, or attempt to so regulate such movement as to affect it because it is across the State boundary, it cannot be said that there is an unwarranted interference with commerce among the States.

The Railroad Commission is not a restriction or hindrance of the freedom of commerce, but is intended to facilitate it and smooth its way by removing hindrances. The fear is professed that the Commission will cripple or destroy the instruments of commerce. If there is danger of this, that cannot make any difference so far as relates to the question now being discussed, because the creator may at pleasure destroy the work of its own power, unquestioned as to the right to do it.

In *Peik v. Railway Co.*, 94 U. S. 164, it was held that the

Legislature of the State of Wisconsin had the power to prescribe a maximum of charges to be made by a railroad company whose road was connected by means of a bridge and a consolidation of companies, with a railroad in another State, for transporting persons or property within the State, or taken up outside the State and brought within it, or taken up inside the State and carried without. The right of the State was put on the ground of the absence of action by Congress on the subject, and, because of this, it was said, the State could provide for the people within the State, even though it might indirectly affect those without. Of course, this reasoning implies the existence of power in Congress to regulate charges, which we question.

Congress has not attempted to regulate charges to be made by railroad companies; and if the right of the State to act with reference to fares and freights carried across the boundaries of the State depends on the absence of Congressional action, the right of the State must be upheld.

The authoritative declaration is that the power to regulate commerce among the several States is exclusively in Congress and denied to the States, in all those cases, where, from the nature of the subject, uniformity of regulation is required, and that, as to these subjects, the absence of Congressional legislation is equivalent to a declaration that there shall not be any regulation; and any State legislation in such cases must fall before the silent but efficient power of the Constitution.

We think that regulating rates for the transportation of persons and property, does not fall within the class of matters requiring or admitting of uniformity. Perhaps, no subject admits of, and demands greater diversity with varying localities, and circumstances justly affecting the value of service.

REGULATING  
RATES DOES NOT  
ADMIT OF UNI-  
FORMITY.

If a State should build and operate a railroad connected with the railway system, and navigable waters of the country, for revenue, might Congress prescribe charges over it for persons and things en route, beyond the limits of the State? May Congress regulate tolls and charges on the Erie Canal connecting the navigable waters of the lakes with those in the East?

Section 6 of the charter of the appellee, confers on the company power to fix, from time to time, by its board of directors the rates at which it will transport persons or property over its railroads, provided they shall not exceed a maximum specified in the act.

The power to contract is an essential attribute of sovereignty, and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. Chartering railroad

companies and other similar associations has long been an acknowledged and a favorite exercise of legislative authority. The right to grant charters includes the right to grant such as will be upheld. Conferring power on the grantee of the franchise to fix rates of compensation at discretion or within prescribed limits fixed by the charter, has been the common practice of the Legislatures of the States of the United States from an early period of their history. The right of the corporation to exercise the powers conferred by the act of incorporation, whether to fix rates themselves or to take those fixed by their charter, and to rest securely on its provisions in this respect, has hitherto been generally regarded as indisputable.

A grant in general terms, of authority to fix rates, is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation, which shall be just and reasonable. It is only where there is unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, that the power of the Legislature afterwards to interfere, can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the Legislature an intent to part with any power, it will be done. Only what is plainly parted with, is gone.

Fixing rates in a charter is a specification of what is reasonable—an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation,—the most important condition of its existence—the inducing cause of its acceptance.

That it was the legislative intent to vest in the appellee the unrestricted right to fix rates, within the limits prescribed by the charter, is clear. That this was a valid contract by the State, obligatory and inviolable by it, we regard as settled authoritatively by Federal and State decisions too numerous for citation.

If anything is or ever can be settled in American Constitutional law, the sanctity and inviolability of a contract between a State and individuals, in the shape of a charter for a business enterprise, accepted and acted on by the corporators, on the faith of its terms and provisions, must be so regarded.

The appellee has the unquestionable right, from time to time, by its board of directors, to fix the rates at which it will transport over its railroads; provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested, and the enterprise set on foot. It is not allowable, now, for one of the contracting parties to interfere with the exercise by the other of its plainly granted rights.

LEGISLATIVE  
CONTROL OF  
RATES NOT RE-  
NOUNCED.

CONTRACTS ARE  
INVIOABLE.

RIGHT OF RAIL-  
WAY COMPANY  
TO FIX RATES.

They are secure beyond the reach of legislation, and cannot be impaired. The State cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons; but it may create corporations, and, where they are not a part of the machinery of government, the franchise cannot be resumed by the legislature, or its benefits be essentially impaired, without the consent of the grantee. To hold otherwise would be revolutionary, and disturb the foundations of society as moulded by the judicial utterances of half a century of constitutional government in America.

While the rates at which the appellee will transport over its roads, not exceeding what is stipulated for in the charter, is for the determination of the appellee, and not subject to the control, within the chartered limits, of the State, it is indisputable that the State may create a Commission or Board, by any name, to see that the creature of the State keeps within its charter limits, and violates none of its obligations as a common carrier.

STATE MAY  
CREATE A RAIL-  
WAY COMMISS-  
SION.

Whatever the charter rights of the appellee, there are many police regulations the State may lawfully adopt; and it may commit their enforcement to any agency of its selection. It may entrust the oversight and supervision of the operations of railroads to a commission charged with the duty of guarding against abuses the State has the right to correct.

We do not feel called on to pass upon all of the numerous provisions of the act complained of, and will decide, only so much as will properly dispose of this case, leaving other questions to be decided as they arise.

The bill is to restrain the Commission "from interfering with the tariff of charges of (complainant) or with the operation, control or income of said railroad . . . and from . . . any revision of orator's tariff or from instituting or aiding in the prosecution of suits for recovery of penalties under said acts, or doing anything under said acts as to orator."

In view of what is written, it must be held that the Railroad Commission cannot interfere with the rate fixed by the board of directors of the appellee, from time to time, for transporting persons and property over its railroad, if those rates are within the limits prescribed by the charter; and that the Commission cannot adopt any rule or regulation as to rates violative of the clearly expressed or necessarily implied charter rights of the company: but, while this is true, the Commission may investigate the control and operation of the company, in order to ascertain that it is conforming to its authorization by the charter. It may do many things contemplated by the act creating it without any violation of the inviolable rights of the company. No reason is perceived why the company may not be required to submit its tariff of charges to the Com-

COMMISSION CAN-  
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WITH RATES OF  
APPELLEE RAIL-  
WAY COMPANY,  
EXCEPT WHEN.

mission in order that it may see that it conforms to the limits fixed by the charter.

So it may be said that the company has no right to make unjust discrimination or show partiality not authorized by its charter in transporting persons and things, and all this the Commission may look after, and it may hear complaints as to any matter over which it has control as to the operation of the company.

We do not see why the appellee shall not be subject to the requirement of the 13th section of the act creating the Railroad Commission, and bound to give notice, as required by this section, to the commissioners, in case of any accident to a train, attended with serious personal injury. And we think the appellee is subject to the 18th section of the act, as to a suitable reception room at each depot, and as to bulletin boards.

Our view is that the right this company has secured by its charter to fix rates, and to manage its affairs by a board of directors, does not exempt it from such reasonable regulations as the State, from time to time, may see fit to adopt for the impartial government of railroads in the State for the interest of the people.

This company may fix rates and collect them, within the limits of the charter, and may earn all it can within these limits; but it is a creature of the State, subject to its government and control, except wherein the State has renounced in plain terms its right of regulation and control. The rights of the company secured by its charter must be upheld, and the Railroad Commission must abstain from any interference with these rights. But outside of these bounds, and as to all those legitimate requirements of legislative authority prescribed in the interest of the community and consistent with the full enjoyment of its contract rights by the company, it must yield to the authority of the State to supervise it.

The act creating the Railroad Commission is not violative of the 14th amendment of the Constitution of the United States, or of any provision of the Constitution of the State, in that it creates a commission and charges it with the duty of supervising railroads.

As before stated, we do not intend to express an opinion on all of the provisions of the act. Many questions may arise under it not necessary to be now disposed of, and we leave them for consideration when presented. We hold that the State had the right to create an agency of the State to exercise such supervision as it may lawfully employ over railroads within its limits, and have declared the immunity from interference secured to the appellee by its charter, and this is all that is necessary to dispose of this case.

Decree reversed and decree made here to modify the injunction in accordance with this opinion.

RAILWAY COM-  
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CRIMINATE.

AND MUST SUB-  
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TION.

RAILWAY COM-  
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NOT UNCONSTITU-  
TIONAL.



## RAILROAD COMMISSION

v.

NATCHEZ, JACKSON AND COLUMBUS R. R. Co.

(Advance Case, Mississippi. 1885.)

The Natchez, Jackson and Columbus R. R. Co. by its charter may "fix, regulate, and secure tolls and charges" for transportation over its road. But such charges must be reasonable and are subject to control in respect of reasonableness by the legislature acting through a railway commission. The creation of such commission does not impair the charter rights of the company. But rates fixed by the commissioners are not conclusive against the railway company.

CAMPBELL, C. J.—The views announced in Railroad Commission v. Yazoo & Mississippi Valley R. R. Co., *ante*, p. 6, dispose of all the objections of the appellee to the act creating the Railroad Commission, except as relates to the constitutional inhibition upon the State to pass any law imparting the obligations of contract.

The appellee is authorized by its charter "from time to time to fix, regulate, and receive tolls and charges by them to be received for transportation of persons and property."

Annexed to every such grant is the implied condition that the charges shall be reasonable, because that is the limit of right imposed by the common law; and, as the power of the corporation is to be exercised in subordination to this tacit condition, it is competent for the Legislature to establish an agency to secure conformity by its creature to the standard of reasonableness. The appellee is not denied the right to fix, regulate, and receive just and proper charges for transportation. That right is secured to it by its charter, and is not infringed by the act creating the Commission. It remains unimpaired. All that has been attempted is to secure conformity to what is reasonable and proper. The creation of a public agency to stand between the railroad companies and those dealing with them to see that the obligation of the former to be reasonable in their charges is duly observed is not an infraction of any right. The final test of reasonableness of rates is not with the Railroad Commission, but, as before, with the Government, through its judiciary. Fixing rates by the Commission is not final and conclusive against a railroad company. It is only *prima facie* correct, and may be tested by the courts. If the action of the Commission is just, it should prevail. If it is not, it may be assumed that it will not. Of that none should complain. The concession made in the bill of the appellee of the right of judicial control to prevent extortion and unjust discrimination is an admission of the right of government control; and if the State can control or supervise at all it may select the agency through which to exert its right.

RAILWAY COMPANY MAY FIX REASONABLE RATES. COMMISSIONERS' RATES NOT CONCLUSIVE.

The appellee is not subject to the absolute control of the Railroad Commission or of the Legislature as to rates for transportation. It has rights which must be respected, and there has been no invasion of them. They are inviolate and inviolable.

This company must be permitted, as authorized by its charter, to fix, regulate, and receive tolls and charges; but this creature of the State must submit to the lawful authority of its creator and protector to supervise it, so as to guard against any abuse by it of its franchise, while it is protected in its fullest enjoyment. Within the limits of its chartered rights it is safe from inference, but it has no right to escape the visitatorial power of the State to ascertain if it keeps within these bounds. Corporations, like natural persons, must yield to the authority of the State to govern, and while they may justly claim that they shall not be despoiled of their chartered rights, they cannot be justified in a claim of immunity from the operation of such reasonable regulations as the State may adopt for their government, in conformity to their charter.

Decree reserved and bill dismissed.

See *Louisville & N. R. R. Co. v. R. R. Commission of Tennessee*, 16 Am. & Eng. R. R. Cas. 1; and *Kaiser v. Illinois Central R. R. Co.*, 16 Am. & Eng. R. R. Cas. 40; and notes to same.

### VICKERS EXPRESS CO.

v.

### CANADIAN PACIFIC CO. *et al.*

(9 *Ontario Reports*, 251.)

In an action by an express company against a railway company and another express company to whom certain privileges were granted by the railway company which were withheld from the plaintiffs, the principal one being that of employing the railway station agents to act as agents of the defendant express company, and in which it was also claimed that the rates charged by the railway company to the plaintiffs were unreasonable.

*Held*, that even if the Court had jurisdiction to inquire into the reasonableness of the rates, which was doubtful, no collusion being shown between the defendant companies, it would not on the record and evidence in this case do so.

*Held*, also, that the employment of the station agents of a railway company to act as agents of express companies, with the privileges they had at the stations, is a "facility" within the meaning of the Consolidated Railway Act of 1879, 42 Vic., c. 9, s. 60, sub-s. (D.), and that when such privilege is granted to one express company and refused to another, whether by contract or obligatory arrangement or not, it is an illegal bargain in contravention of the third subdivision of the Act.

THIS was an action brought by the Vickers Express Company (Limited) against the Canadian Pacific Railway Company and the Dominion Express Company to compel the railway company to afford the plaintiff company the same facilities in conducting their express business on the Toronto, Grey, and Bruce Division of their

line of railway as they did to the defendants, the Dominion Express Company.

Plaintiffs claimed that the railway company refused to allow its agents to act as agents for plaintiff express company, although such agents were permitted by the railway company to act for the Dominion Express Company. Plaintiff also claimed that the rates charged it by the railway company had never been fixed by by-law of the railway company and approved by the governor in council, and that defendant had never complied with the provisions of the "Consolidated Railway Act of 1879" as to rates, which were hence unreasonable and exorbitant, and plaintiff claimed a refund and damages.

Defendant railway company alleged that none of its station agents had been required to act for the Dominion Company, and that they were free to decline to act for any express company, the only instructions given to them being that if their other duties permitted them to act for any express company it was the desire of the company that they would act for the Dominion Express Company exclusively, and defendant railway company denied that the use of a station agent as an express agent was one of the "facilities" which, by the Statute Railway Companies, were bound to furnish upon equal terms to all, and denied also that its rates were unreasonable.

Defendant express company were not at first made parties, but were subsequently brought in, and in defence claimed the rights and privileges claimed in their agreement as to rates and facilities with the railway company and the right to make arrangements with any one they could to act as their agents.

The matter in question, relating to the employment of station agents as agents of the plaintiffs, had come up before in a suit in which the Vickers Express Company were the plaintiffs and the Canadian Pacific Railway Company were the sole defendants. An interim injunction was granted on November 11th, 1884, by Boyd, C., and a motion to continue the same was made and fully argued on November 27th, 1884, before Proudfoot, J., when

*McCarthy, Q. C., and Creelman* for the plaintiffs.

*S. H. Blake, Q. C., and R. M. Wells* for the defendants.

And the motion was refused and the injunction dissolved by the following judgment, on the ground that the Dominion Express Company should have been made a party.

**PROUDFOOT, J.**—Motion to continue injunction granted by the Chancellor on 11th November, 1884, restraining the defendants from hindering or obstructing or otherwise interfering with or preventing the station agents of the defendant company on the line of the Toronto, Grey & Bruce Railway from acting as

FACTS

agents of the plaintiff company, and to extend the relief by granting a mandatory order compelling the defendant company, with respect to such agents, equal facilities on equal terms and conditions to those granted to the Dominion Express Company.

It appears that since the opening of the Toronto, Grey & Bruce Railway, John Joseph Vickers, the now president of the plaintiff company, had the exclusive privilege of carrying express matter over that railway, and since the 1st of January, 1882, the business was conducted under an agreement to continue in force for one year, and thereafter subject to be determined upon six months' notice in writing by either party.

The defendant company are operating the Toronto, Grey & Bruce Railway under a lease, and on the 10th May last gave notice to terminate the arrangement with J. J. Vickers on the 10th November inst. (1884).

Subsequently to the 10th May, all the property of Vickers in connection with that express business was sold to the plaintiff company, who have taken possession hereof, and all the officers, messengers, and other employees of Vickers have been transferred to the plaintiff company.

The plaintiff company has been incorporated by letters patent issued under the provisions of "The Canada Joint Stock Companies Act, 1877."

The defendant company have made an agreement with the Dominion Express Co. on the 1st January, 1884, for carrying their express matter, etc., on the Toronto, Grey & Bruce Ry., and, subsequently to that general agreement, another agreement was made between the defendant company and the Dominion Express Co., by which, in consideration of the Dominion Express Co. carrying the money packages of the defendant company free on all lines operated by them, the station agents of the defendant company, wherever they might do express business at all, should act exclusively as agents of the Dominion Express Co.

Negotiations have been entered into by the plaintiffs with the defendants as to a contract for carrying express matter over the Toronto, Grey & Bruce Ry.; the defendants have submitted a draft agreement similar to the general contract they have with the Dominion Express Co., but it has not been executed.

The plaintiffs claim that the defendants are bound to grant to the plaintiffs equal facilities on equal terms and conditions to the facilities granted to the Dominion Express Co., and that the plaintiffs are entitled to have the station agents on the said line of railway in the employ of the defendants act as agents for the plaintiffs so long as they act as agents for the Dominion Express Co.

The defendants say that it is optional with the railway agents whether or not they should do express business. They are not required to act for either company. The defendants say to them

that if their duties will admit of it, and if they elect to do the express business for any company, it shall be for the Dominion company; and this, the defendants are advised, is not inconsistent with the Railway Act.

The defendants object that the Dominion Express Co. should be parties to this suit; and that until the agreement is executed between the plaintiffs and the defendants the plaintiffs have no *locus standi*.

I am inclined to think that the former of these objections is valid. It is true the Dominion Express Co. may be added as a party to the suit. That, however, is not the question. That express company has, by contract with the defendants, a right to say that the station agents if they act at all shall act only for them. The present application is to give the plaintiffs liberty to employ these agents for them also. It is not a matter in which the defendants only are concerned. The Dominion Express Co. should have a right to oppose any application that in its result would affect their arrangement with the defendants.

The plaintiffs have entered into no agreement with the railway company, it is true, but they are now seeking to have one granting them equal facilities with the other express company, which the defendants refused to give them. The plaintiffs have a right to apply to the court to enforce a right, if it be a right, given to them by the statute.

The principal question discussed was, whether the supplementary agreement between the defendants and the Dominion Express Co. contained a grant of such facilities as the plaintiffs were entitled to share.

The Railway Act of 1879 (42 Vic. c. 9, s. 60, D.) under the heading "Traffic Arrangements," in the first and second sub-sections, deals with agreements between railway companies respecting traffic, and requires them to afford each other every facility for forwarding traffic, without preference or favor.

The third sub-section provides that "any railway company granting any facilities to any incorporated express company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same."

The fifth sub-section interprets the word "Traffic," for the purposes of the four next preceding sub-sections, to include not only passengers, etc.

It cannot be doubted, I think, that an arrangement by which the express companies are allowed to employ the station agents of the railway company as their agents is a facility, and a very great facility, for their traffic. It is so sworn upon the affidavits on behalf of the plaintiffs and is not denied by the defendants as a matter of fact. When this privilege is refused the express companies

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require to employ an agent at every little station at a considerable expense, to do the work that can be done by the railway agents as well and at a much less cost.

The plan adopted by the railway company is ingenious, but the effect of it is to grant a privilege to one company that they refuse to the plaintiffs. On the order being sent by the railway company to their agents, the agents sent in their resignations; as pithily expressed by one of them, "the order is not compulsory, but *we must*."

The defendants say that *traffic* is confined to the *receiving, forwarding, and delivering of traffic*, and that the action of the railway company does not interfere with this. The cases they referred to were decided upon the English Act of 1854 (17 and 18 Vic. c. 31), which requires the railway companies to afford all reasonable facilities for the *receiving, forwarding, and delivering* of traffic without any undue or unreasonable preference—a very different provision from an Act which requires *any facilities* granted to one to be granted to the rest. The cases relied on by the defendants were: *Pickford v. Caledonian Ry. Co.*, 1 Nev. & McN. 252; *West v. London & N. W. Ry. Co.*, L. R. 5, C. P. 622; *Beadell v. The Eastern Counties Ry. Co.*, 2 C. B. N. S. 509; and *Oxlade v. Northeastern Ry. Co.*, 15 C. B. N. S. 680.

None of them are precisely in point. That which was said by the defendants' counsel to be the nearest to the present was *West's Case*, *supra*, but the court were equally divided and no decision was made. But the circumstances are very different from this. The railway company had leased their wharf used for storing coals to one coal merchant, and thus excluded others from the use of it. Under our Act that would doubtless have been considered a facility, as it was by *Bovill, C. J.*, and *Keating, J.*, even under the English Act. The other Judges considered that this was not an interference with the *receiving, forwarding, or delivering* of traffic under the English Act.

In *Pickford's Case*, the railway company allowed certain carriers a monthly credit while the plaintiff was compelled to pay ready money; the company's own agents were allowed to sort goods within the station, while the plaintiff was not; and that the company allowed their own agents two boxes within the station to keep books and accounts. An injunction was refused because the company might prefer their own agents, not being separate traders.

*Beadell's Case* was decided upon the ground of public convenience and the importance of keeping vehicles plying for hire in the station yard under the control of the company.

*Oxlade's Case* seems to have proceeded upon the ground that what was sought would be utterly subversive of the existing system of traffic, and that the colliery owners employed all the carrying power of the company.

It may be quite true that the plaintiffs could not compel the defendants to give the plaintiffs the use of their agents, but if the defendants allow their agents to act for one company it is a facility that cannot be denied to the other company.

As I have said, the Dominion Express Co. are necessary parties to the suit, and the continuance of the injunction may inflict a material injury upon them, and that rather because, I think, the privilege is a valuable one. So that I must refuse this motion, but without costs.

I have given my opinion on the questions argued before me, as it may, perhaps, prevent further litigation.

This present action was tried at the Spring Sittings at Toronto, on June 1st and 2nd, 1885, before Boyd, C.

Robinson Q. C., McCarthy, Q. C., and Creelman for the plaintiffs. The principal questions to be decided in this action are questions of law. The court should decide whether equal facilities have been granted, and whether the tolls imposed are unreasonable. Mr. Justice Proudfoot has decided what are "facilities," and that they include the use of agents of the company. See *Wells v. Oregon and C. Ry. Co.*, 18 Fed. R. 667; *Re Marriott v. The London and Southwestern R. W. Co.*, 1 C. B. N. S. 499; *Hodges's Law of Railways*, 3d ed. 663. Are the defendants, the railway company, bound to carry for reasonable rates or not? This case can only be argued against the plaintiffs if the section 60 of the statute (Railway Act of 1879, 42 Vic. c. 9.) overrides the common law and furnishes a complete code of itself: *Hardcastle's Construction and Effect of Statutory Law*, 163. Carriers were not bound to carry for equal rates under the common law: *Sutton v. The Directors, etc., of the Great Western R. W. Co.*, L. R. 4 H. L. 226, 237. It required a statute to enforce that; but no provision was required compelling them to carry for reasonable rates, for that is required by common law. A toll implies uniformity of compensation for equality of service: *New England Express Co. v. Maine Central R. R. Co.*, 9 Am. Law Reg. 728; *McDuffee v. The Portland and Rochester R. R. Co.*, 52 New Hampshire, 430. The Court should inquire and fix what are reasonable charges: *Story on Bailments*, 5th ed. 508; *Crouch v. The Great Northern R. W. Co.*, 11 Ex. 742, per Alderson, B., p. 752; *Brown on Carriers*, 75; *Dinsmore v. Louisville, Cincinnati & Lexington R. W. Co.*, 2 Fed. R. 465; *Fargo v. Redfield*, 22 Fed. R. 373; *Texas Express Co. v. Texas and Pacific R. W. Co.*, 6 Fed. R. 426; *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. 162. The two contracts when compared show they were not the same in terms: *The Canada Southern R. W. Co. v. The International Bridge Co.*, L. R. 8 App. Cas. 723, 732.

S. H. Blake, Q. C., and Cassels, Q. C., for the railway company. As to the difference between the two agreements, the plaintiffs

should have returned the one sent to them with a memorandum of their objections, and should not have refused to sign it. The evidence shows that the defendant railway company were willing to give the plaintiffs the same agreement as to terms that the defendant express company got. There is no law to compel a railway company to do express business at all. The only place where express business is referred to is that in the Statute. It is a peculiar business and not covered by the general terms of the Act. It is left to the option of the railway companies to do or not, but if they do it they must do it on equal terms for all. This is under the head of "Traffic Arrangements" in the Act. The position of the section serves to explain what "facilities" are and its scope. Mr. Justice Prondfoot's finding was a mere *obiter dictum*, and not a judgment. "Facilities" refers merely to traffic arrangements as to "receiving and forwarding and delivering of traffic." There is no obligation to carry express goods. *Sargent v. Boston & Lowell R. R. Corporation*, 115 Mass. 416, 421. It must depend on the bargain between the two companies. The cases cited as to the right to the express business rest on estoppel. The best test of the reasonableness of the terms offered to the plaintiffs is that the defendant express company are willing and have now entered into an agreement on the same terms. The defendant express company have agreed to pay the minimum guarantee, although they know that another company may compete with them. The agreement made with the defendant express company extends over the whole of the defendant railway company's system, and in that respect differs from the agreement asked for by the plaintiffs. If the plaintiffs are entitled to any agreement, it must be to one similar to that granted to the defendant express company, and not limited to one part of the defendant railway company's line. There is no jurisdiction on the part of the Court to interfere with the rates at present: s. 17, sub-s. 11. This is not a matter to refer to the Master as to whether the rates are exorbitant; that should be settled, if at all, by the Court itself: *West v. London and Northwestern R. W. Co.*, L. R. 4 C. P. 622, 630-1. Traffic arrangements are the outcome of contract: *Evershed v. London and Northwestern R. W. Co.*, 3 Q. B. D. 134; s.c. L. R. 3 App. Cas. 1029; *Great Western R. W. Co. v. The Railway Commissioners*, 7 Q. B. D. 182; *Manchester, etc., R. W. Co. v. Denaby, etc., Co.*, 14 Q. B. D. 209; *Manchester, etc., R. W. Co. v. Brown*, L. R. 8 App. Cas. 703. See also the special Acts in connection with this railway company, 47 Vic. c. 54 and 61 (D.).

Moss, Q. C., for The Dominion Express Company. No one has any right to bring the defendant express company before the court except for the purpose of altering their agreement, and that cannot be done in this action. The plaintiffs say they are willing to pay whatever my clients pay. Our agreement was made with the rail-



way company before the plaintiffs had any rights as a company. "Agents" are an outside matter and apart from all arrangements as to the carriage of express goods.

Robinson, Q. C., in reply. The conduct of the defendant railway company was harsh and unjust. The plaintiffs have lost all their agents and their business is disarranged: Hodges's Law of Railways, 6th ed. 474, 491. They had no time to complain or make any objections to the agreement because of the action of the railway company. They have the right to insist on the railway company doing express business. The case in 115 Mass. 416, is wholly opposed to all the later decisions since 1875.

Boyd, C.—I think I am in possession of this case sufficiently to dispose of it, though I may look at some of the authorities FACTS. cited before making a final disposition of it. Substantially there are only two large questions to be dealt with, and they have been fully and ably argued. The first is, as to the right of the Vickers Express Co. to complain as to the exorbitance of their charges; and, second, as to whether or not, under the arrangements made by the Canadian Pacific Ry. Co. with the Vickers Express Co., and the Dominion Express Co., there has been on the part of the Canadian Pacific Ry. Co. any undue preference shown to the latter as against the plaintiffs.

Now, on the first question, as to whether or not there is the right to go into consideration of what is proper to be paid for the carriage of express goods, my opinion is against the right of the plaintiffs to go into that upon this record and in this way.

Possibly a very important part of the plaintiffs' case has been cut from under them by the fact that the question of collusion hinted at in the defence of the railway company is not open to them on this record. It may very REASONABLE-  
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SIDERED. well be if a case of collusion could have been established between the two defendant companies, that then the whole matter would have been open as argued by Mr. McCarthy and Mr. Robinson, but there is this obstacle to consider, that I cannot at present regard the bargain between the two defendants in any other light than as a *bona fide* arrangement between them, by which the express company obtained certain rights and privileges in regard to carrying goods over this line.

That bargain, also, was made, as Mr. Moss has pointed out, by an incorporated company before the plaintiffs were in the position of being an incorporated company. I am not able to say that there was collusion in that arrangement. The presumption is that it is a matter of fair dealing between company and company, and, regarding it in that light, this is most cogent proof to show that what the Dominion Co. pays is a reasonable rate for the plaintiffs to pay.

Further than that, we find that Mr. Vickers (who represents 495 of these 500 shares forming the stock of the plaintiff company, and whose evidence is of great moment as to the views he formed of what should be paid), after he knew the terms that had been agreed upon between the two defendants, expressed his willingness to submit to the same terms. In the box he said the same thing. Of course his counsel sought to protect the company which bears his name by saying that they did not agree to that, but the evidence preponderates in favor of the proposition that there is not such exorbitance, in reference to these terms of payment, as to justify me in finding for the plaintiffs. It is evident from what Mr. McCarthy said, and from the facts of the case, that the real cause of this action was not the terms of payment proposed by the railway company, but that the plaintiffs' real complaint was that the railway agents were not allowed to act as the plaintiffs' agents along the line. If the agents of the railway company had been allowed to act indifferently between the two express companies we should not have had this action; but a preference having been given in that manner the parties necessarily went to law, and as they were going to law they thought they might as well litigate this large point as well as the other.

All of this litigation has arisen from that other reason, and not because this was felt at the outset to be such an exorbitant demand as could not properly be paid. That is the way the evidence strikes me. It would need, I think, very cogent evidence indeed of exorbitance to induce the court to embark upon an investigation and inquiry and an adjustment as to this amount, interfering as it would with the internal machinery and financial arrangements of this great railway company. It is a matter that the court will not lightly enter upon, if there is jurisdiction at all; but I think the circumstances of this case and the evidence before me do not justify me, by any means, in coming to the conclusion that there was such injustice in this demand as to induce the court to interfere as prayed.

In addition to the other evidence as to reasonableness there is this evidence, which has not been met in any satisfactory way, that there are a great number of parcels, valuable though small in bulk, conveyed, and there are other kinds of business transacted by the express company, such as the collection of and transmission of money and notes, which is not represented in the returns of bulk to the railway company, but out of which the express companies realize large earnings, and Mr. Vanhorne stated that the requiring of a guarantee was one of the means by which the railway would get percentages on this business, as they were unable to check it in any other way. This caused them to impose the guarantee of \$900, which one express company *bona fide* engaged to pay, and could be obliged to pay.

I am not called upon, therefore, to decide whether there was any unreasonable demand on the part of the Canadian Pacific in requiring that this express company should carry on the same terms as the Dominion Express Co. I think the case as to terms comes within the 3d sub-sec. of sec. 60, 42 Vic. c. 9 (D.); and the point before me to determine is, whether or not the railway company have afforded equal facilities to the two companies. I find no unjust demands on the part of the Canadian Pacific Ry. Co., such as require the court to modify the charges.

I do not think the case calls for that interference, irrespective of the point raised as to whether I have jurisdiction; my own opinion is, that there is no jurisdiction to deal with that question of terms as if they were on the footing of being tolls and charges, such as are mentioned in the other sections of the Act. My view is, that it is a matter of arrangement between the companies themselves as to the terms they shall agree upon. They are large concerns; they are not dealing as individuals or with individuals.

Persons have the right to travel on the terms of paying for themselves and baggage, but when the railway is going to deal with a corporate body, as an express company, then there is the prescribed mode of doing so as between two contracting parties. It is not necessary, however, to decide so much as that, because, I think, the evidence and the circumstances in this case do not require me to go so far.

On the second branch of the case my opinion is in favor of the plaintiffs' view, that there was preference shown in the way in which the Canadian Pacific Ry. Co. extended its facilities to the Dominion Express Co. The fact of there being a decided advantage in utilizing the local agents of the railway as express agents is well proved. Mr. Vanhorne's evidence is perfectly conclusive on that point. He says, "It is a convenience to the Dominion Express Co. and of some value to have our agents; they can arrange with them for less than with other persons. In some small places the depot is the centre of business, and this gives the office without any expense. Our agents could use without our objecting the company's safe for storing valuables for the express company. We could not allow the Vickers company to use our offices or safes if our agents were doing exclusive agency for the Dominion Express Co."

STATION-AGENT  
A "FACILITY" TO  
BE EQUALLY EX-  
TENDED TO ALL.

So we have a valuable—whether we call it a perquisite or a collateral advantage—we have a most valuable incident to this arrangement which was made between the two defendant companies in reference to the conduct and management of the express business. Now we find the Canadian Pacific Ry. Co. in their defence put this exactly on that point. There is no such dealing with the matter as I think they were endeavoring to deal with it in the evidence, by putting in this letter of the 30th October show-

ing that these were the instructions given to their agents. I think if the directions given to their agents shown in this letter of the 30th October had been uniformly observed and continued the Vickers Express Co. would have no cause of complaint.

But the evidence does not corroborate that such were the instructions given. It is proved that in one instance or two the company's agents have been required to act for the Dominion company, but their pleadings say: "None of the company's agents have been required to act for the defendant company. They are, and always have been, free to decline acting for any express company. The only instructions given them by the defendant railway company were, that if their other duties permitted them to act for any express company it was the desire of the company that they should act for the defendant express company exclusively." But the desire was expressed a little more strongly and emphatically than was pleaded. Then they say in the 6th paragraph that, "The defendant railway company submits, etc." They are not compelled, and no court would pretend to compel them, to make their agents act for any other company; but what is proved is, that they have not remained indifferent between the two companies—not impartial.

If they had retained the position indicated in their letter of 30th October, then, I think, they would have been indifferent, as at that date, and by continuing that course, they would have acted impartially as required by the statute.

This letter says: "In reply to your . . . to advise you one way or the other." That was precisely the position that the statute intended the railway company should take where there were competing express companies claiming advantages at their hands. They were not to show preference to one more than the other. It has been argued "facilities" do not cover the employment of station agents, but that point was considered in the decision of my brother *Pondfoot* in the former case between these companies, yet, depending upon the same facts which are proved here, I agree with his view and adopt the reasons which induced him to come to that conclusion.

I do not think I can construe that sub-section as argued by Mr. Blake, viz., that "facilities" is to be read as modified or limited by the same word as used in previous sub-sections. In the second clause it says: "Every railway company shall . . . afford all reasonable facilities . . . for the receiving and forwarding and delivering of traffic." Now the "facilities" there are defined and confined to these three things. These are the same three incidents as to traffic arrangements which are referred to in the case cited of *West v. The London & North-western Ry. Co.*, L. R. 5 C. P. 622, but when you come to the third sub-section it reads, any railway company granting "any facility"; now "any facility" covers "every

facility," and it should not be limited by reading into it the words about receiving, forwarding, and delivering. And then, when you turn over to sub-section 5 of that section 60, you find that it defines "Traffic" as including cars, trucks, and vehicles of any description adapted for running over the railway, and the word "Railway" includes all stations and depots of the railway.

Now we have the article of trucks brought into prominence in the evidence. The definition is not limited to what runs on the iron rails. Trucks and cars are vehicles which may run not merely on the iron rails, but at the stations and depots of the railway.

The railway includes these stations, and to manage stations you need agents, and so, as forming a part of the whole machinery, there is no such absurdity as was suggested in defining facilities as including the use of agents.

The railway can itself interpret facilities when it grants to one company what it denies to another. Now, the value of these agents—that is, the value of the exclusive employment of the railway agents for use by express companies as their agents—is shown clearly in this; these agents have the right to use the company's trucks, vehicles, the company's depots, and baggage houses as the places for storing goods. They have also the right to use the iron safes which are there, the company's property; and the right to use all these passes with the employment of the agent when he is employed by any particular express company; so that you have this very property of the company, the carts, vehicles, and places for storing the goods which are admitted to be among the facilities for doing business for the company—you have all these embraced in this arrangement by which one express company can have their exclusive use to the detriment of a rival company.

Of course there is no compulsion when the favored company gets the exclusive use of the railway agents. There is no compulsion literally; the man is not taken by the neck and told to act, but the fact of his not being perhaps very well paid induces him to seek money by acting for an express company, and it thereby becomes the strongest kind of compulsion when he is told he can add to his income with the sanction of the railway company whose employee he is. The railway company says, "Now you need not act for any company, we do not object to you acting for an express company; but it is our desire that if you do, you should act for the Dominion Express Co."

Well, there is no compulsion in the matter, but the result is thus arrived at more surely than by the strongest kind of compulsion. There is the golden bait held out before the man; and he is told "you can take that, but you must only take it from the one company," and he forthwith takes it, and brings with it to the favored express company the railway company's safe, and trucks, etc.

Turn to the evidence and you find that case which occurred at

Orangeville. The baggage-master at Orangeville refused to allow the plaintiff's agents there to use the railway truck, and railway baggage-room for express purposes contrary to the previous custom of that place. I cannot suppose that he did so without having orders from his superiors; and although the use of them was afterwards granted, it was after litigation was threatened or commenced.

Another witness said Mr. Steele told him the company's agents would be required to act for the Dominion Express Co. This is what the pleader says was not done, that they did not require any of their servants to act, but this man was told he would be required to act for the Dominion Express Co., and therefore he at once telegraphed his resignation to Vickers. Mr. Steele was not called to contradict that he did use this expression to this man, and I think it is proved. It would be a very simple thing; they could easily have called Mr. Steele if he could have contradicted what Mr. Smith said, so that we have affirmatively proved that the railway company actively intervened in procuring their officers to act for the Dominion Express Co., and in preventing them acting for the Vickers Co.

But it is said that the Dominion company give valuable consideration for getting this privilege as to the railway agents, and we are referred to some verbal arrangement, which is certainly somewhat mysterious in the manner of its negotiation. If on that account they are unable to grant equal facilities to other companies, if it is a contract or obligatory arrangement, it works none the less to the prejudice of the competing express company, and is an illegal bargain, as being in contravention of this third sub-section.

If the plaintiffs agree to carry money for the railway on the same terms as the Dominion company, I do not see that this by-bargain between the two defendants can be used to the disadvantage of the plaintiff company.

I think it is an agreement that cannot be enforced at the expense of the Vickers Express Co.; and being an infringement against this provision of the Act, it was necessary to bring the Dominion Express Co. here to have a declaration of that invalidity as against the plaintiffs. I think that the railway have erred in not leaving the matter at large for their agents to act for which company they please, as expressed in this letter of 30th October; and if I retain that view on further looking into the case the result will be that I grant the plaintiffs relief on that part of the case declaring that there had been a preference, and referring it to the Master to ascertain the damages they sustained by the railway refusing to take their goods on the 2d and 3d December, and give them the costs of the action so far as that is concerned, but dismissing the case with costs as to all the other matters.

The costs of the Dominion Express Co. should be paid by their co-defendants.

I give costs to the Vickers Express Co. because I do not think it was in consequence of any dispute about the terms of this contract they were to sign that the railway refused to carry their express freight; that was merely a minor feature. The Canadian Pacific Ry. Co. placed their real reason plainly upon this ground by their letter and telegram, in which they state that this employment of their agents is a collateral matter, and will have to be settled by the court. If I am right in my finding the defendant company were wrong at that time, and that it was their taking such a stand which induced the plaintiffs to begin these proceedings; and inasmuch as this was one of the terms which the Vickers Express Co. were not obliged to submit to, I think they were doing right in coming to the court.

ROBINSON, Q. C.—I suppose the injunction will be continued.

BOYD, C.—It will be referred to the Master to settle the terms of the agreement if you cannot agree between yourselves, and in the meantime they should receive your goods on equal terms with those of the other company.

BOYD, C.—I have further considered my judgment, and see no ground to change it.

## RHODES

v.

## NORTHERN PACIFIC R. R. Co.

(*Advance Case, Minnesota. July 24, 1885.*)

A railway company may, under Minnesota Statutes (ch. 31, Gen. Laws, 1874; Gen. Stat. 1878, c. 124, §§ 7, 8), furnish a suitable warehouse at any of its stations for the handling of grain to be shipped over its road, and may designate such warehouse as the exclusive place of delivery of such grain, and refuse to receive it or to furnish cars for its shipment at any other place.

But it cannot lawfully designate an elevator owned by a private person as such place of exclusive delivery or receipt of grain.

A railway company operating an elevator at one of its local stations as the exclusive place of receiving and delivering grain at such station, cannot lawfully require a shipper of grain who delivers it there to accept a receipt providing that if, for any reason, it shall become necessary to remove the grain, the company reserves the right to deliver it from any other elevator or warehouses operated by the company, subject to the same rate of freight to terminal points as the present tariff from the local station where the grain is delivered to the terminal point where it is destined to go; nor can it subject the grain to a compulsory charge for cleaning.

APPEAL from an order of the district court, Madison county.

A. F. Story for respondent, John H. Rhodes.

*W. P. Clough and John W. Willis* for appellant, Northern Pac. R. R. Co.

MITCHELL, J.—Gen. St. 1878, c. 6, provides: Sec. 75. "It shall FACTS. be the duty of any railroad corporation, when within their power to do so and upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all usual kinds of freight." Sec. 76. "Any railroad corporation who shall violate any of the provisions of this act, as to extortion or unjust discrimination, shall forfeit for every such offence to the person, company, or corporation aggrieved thereby three times the actual damages sustained or overcharges paid by the said party aggrieved, together with costs of suit to be recovered in a civil action therefor."

This action was brought to recover treble damages under this last section. The violation of the statute complained of is that defendant, though able to do so, refused, upon reasonable request, to furnish plaintiff cars in which to ship wheat out of his warehouse, situate in the village of Little Falls, adjacent to defendant's track, when, at the same time, it furnished cars to one Sawyer in which to ship wheat out of his warehouse or elevator similarly situated. As no point is made to the contrary, we shall assume without discussion that this, unless excused or justified, constitutes an act of discrimination within the meaning of the statute cited, entitling the party aggrieved to treble damages. The court, in substance, found (and the evidence sustains the finding) the refusal of defendant to furnish plaintiff cars in which to transport his grain, after request and reasonable notice, and that at the time of such refusal it was within its power to furnish them, and that at the same time it was furnishing cars to Sawyer to ship wheat out of his elevator. Indeed, upon the trial the defendant did not seriously dispute these facts, but assumed to justify its refusal upon the ground that it had itself provided and maintained at the station of Little Falls an adequate elevator (this Sawyer's elevator) for the handling and storing of all grain designed for shipment, and which it had designated as the exclusive place for receiving grain for transportation; and that, having done this, it was not required to receive grain at any other place or warehouse. Gen. St. 1878, c. 6, § 75, requires every railroad corporation to provide and keep suitable facilities for receiving and handling all usual kinds of freight at any depot on the line of its road. Gen. St. c. 124, § 7, prohibits any railroad company, or person . . . engaged in the business of keeping an elevator or warehouse, situated upon the line of any railroad for receiving and handling grain for other persons, to charge any greater sum than two cents per bushel, for receiving, elevating, handling, and delivering such grain. Section 8 of the same chapter provides that "whenever any railroad com-



pany shall refuse to receive, store, handle, and deliver grain at any station on its road, at the rates provided in section 1 (7) of this act, then in such case said railroad company shall, upon demand, allow any person . . . to erect and maintain, at such station adjoining the railroad track or side tracks, warehouses, to receive, store, and ship grain; or, at the option of the railroad company, such company shall build and maintain a side track to and for the use and accommodation of any warehouse near the station."

Inasmuch as small grain transported in bulk cannot be conveniently loaded directly from teams into the cars, but must ordinarily be first placed in warehouses or elevators and temporarily stored there, these duties and obligations in regard to handling and storing grain were undoubtedly imposed upon railroad companies as being necessarily incident to the convenient transportation of it by them as common carriers. Independently of any statute, common carriers have an undoubted right to adopt reasonable rules and regulations as to the place or places where they will receive freight for transportation. And in view of these statutory provisions already cited we think it was clearly the legislative intent that if a railroad company itself should furnish suitable warehouse facilities for receiving, handling, and storing all grain designed for transportation over its road, it might designate such warehouse or elevator as the exclusive place at which it would receive grain for shipment at that station, and that it might refuse to receive it or furnish cars for its shipment at any other place; but that when it failed or refused itself to furnish these facilities on the terms fixed by statute, then it should be required to allow others to build warehouses adjacent to its track, or else build side tracks to warehouses near the station, so that the public might be furnished with the proper facilities. Of course this obligation in such cases necessarily implies and includes the further obligation of furnishing cars upon reasonable notice in which to ship grain out of such warehouses.

The court finds that at this station one Sawyer, by agreement with defendant, kept and maintained an adequate elevator for the reception and delivery of wheat. But he also finds that "no wheat was received into said elevator, except upon certain conditions embraced in, printed upon, and made part of a wheat ticket so called, which ticket (one of which in blank, Exhibit B, was in evidence), after being filled out by the inspector as to date, number of bushels, and quality of wheat, was delivered by the inspector to the owner or depositor." These conditions, as shown by Exhibit B, are that the amount, kind, and grade of wheat designated in the receipt will be delivered to the holder upon surrender thereof, subject to the following terms of storage: CONDITIONS IN RECEIPT HELD UNREASONABLE.

"(1) For receiving, elevating, insuring, and delivering, and fifteen days' storage, 2½ cents per bushel; (2) storage after

the first fifteen days is  $\frac{1}{2}$  cent per bushel for each fifteen days, or part thereof, but shall not exceed five cents for six months; (3) the grain is held by me at owner's risk of loss or damage from the elements (not heating), the act of God, or which may in any way have been caused by the act of the holder of this receipt; (4) if, for any reason, it shall become necessary to remove this grain, I reserve the right to deliver it from any other elevator or warehouse operated by me, subject to the same rate of freight to Duluth, St. Paul, or Minneapolis, as the present tariff rate from this station; (5) this grain is subject to a charge of  $\frac{1}{2}$  cent per bushel for cleaning; (6) any grain of the previous crop remaining in store on and after July 1st will be held at owner's risk as to condition."

We think the evidence sustains the finding that wheat was received at the Sawyer elevator only on these conditions, with the possible modification that if a depositor did not wish his grain insured, the charge named in the first condition would be reduced to two cents per bushel. But, conceding this, it is still apparent that this receipt contained conditions (notably the fourth and fifth) that no shipper of grain was bound to submit to, and which no common carrier has a right to exact from one who delivers grain to him for transportation, and, as incident thereto, for temporary storage until shipped.

While the court finds, and the evidence shows, that Sawyer kept and maintained this elevator "by an agreement" (what does not appear) with defendant, yet the entire evidence in the case shows that it was managed and operated by him in his own name as his own personal and individual business, and not in any sense as the agent of the railroad company. In short, that when a person deposited grain in this elevator he was contracting with Sawyer personally as a warehouseman, and not with the railroad company. Nobody was responsible for the wheat, so far as appears, but Sawyer individually. The effect of this was that every person who wished to ship wheat over defendant's road had first to deliver it to a particular warehouseman to store and handle. All that the railroad company did in the premises was to dictate what warehouseman should have a monopoly of the business at this station. This they effected by refusing any other warehouseman facilities for shipping. This was not a providing of suitable facilities by the railroad company within the meaning of the statute. Of course, it is not important who owns the buildings, or who is put in charge of the business, or who receives the profits of it; but, in order to constitute a compliance with the statute, the business must be so conducted that when a proposed shipper delivers his grain for transportation, and for temporary storage incident to such transportation, he can deliver it to the railroad company, and not be compelled to deliver it to some particular ware-

ELEVATOR MO-  
NOPOLY NOT SUB-  
STAINED.

houseman, who might or might not be responsible, and to whom the shipper might not be willing to intrust his property.

For these reasons we are of opinion that the defendant had not provided suitable facilities for the receiving, storing, and handling of grain, or at the rates and on the terms fixed by law; and, not having done so, it was required upon reasonable notice, and when able to do so, to furnish plaintiff cars for the shipment of grain out of his warehouse situated adjacent to its track or side track, at this station.

Judgment affirmed.

**Terminal Facilities. Discrimination.**—Where a common carrier that acted as superintendent of goods traffic for a railway company at a particular station was allowed by the railroad company to hold himself out as its agent for the receipt of goods to be carried by its line, and goods thus received by him were received without conditions which the company required of other shippers at that station. *Held*, that these facts showed undue discrimination in favor of company's agent. *Baxendale v. Bristol, etc., Ry. Co.*, 11 C. B. N. S. 787: So where the railway company received goods from a particular individual later than it did from the general public. *Garton v. Bristol, etc., Ry. Co.*, 1 B. & S. 112. So where the railway company admitted its own vans with goods to be forwarded at a later hour than it admitted the vans of others. *In re Palmer, London, Brighton & South Coast Ry. Co.*, L. R. 6 C. P. 194; *Ragan v. Aiken*, 9 Lea (Tenn.) 609; *Johnson v. Pensacola, etc., R. R. Co.*, 16 Fla. 623. It was doubted if the railway company had any right to make such an arrangement even if it was for the convenience of the public, by giving an opportunity for sending parcels later than would otherwise be possible. *In re Palmer, London, Brighton & South Coast Ry. Co.*, L. R. 1, C. P. 588.

Again, where a railway company employed an agent to receive goods at a particular station and to deliver them to consignees, and refused to deliver goods at that station to any other carriers without a written order specifying the particular goods, this was held to be an undue discrimination. *Parkinson v. Great Western Ry. Co.*, L. R. 6 C. P. 554; *Fishbourne v. Great Southern, etc., Ry. Co.*, 19 Sol. Journ. 859.

It is important to bear in mind that in determining whether an undue discrimination exists, the convenience of the railroad company is to be considered. Thus where by reason of increase of business the railway company was obliged to separate its mineral from its goods traffic at its station at O, and to handle its mineral traffic at another station but still continued to deliver coal at O, to a large gas works near the station which had side-tracks, so that coal consigned to it could be removed at once, *held*, that this did not constitute an undue preference. *Lees v. Lancashire, etc., Ry. Co.*, '8 Sol. Jour. 629.

In *McCoy v. Cincinnati, etc., R. R. Co.*, 18 Fed. Rep. 3, it was *held*, that a railroad company cannot bind itself to deliver to a particular stock-yard all live-stock coming over its line to a certain point, but it is bound to transport over its road and deliver to all stock-yards at such point, reached by its tracks or connections, all live-stock consigned, or which the shippers desire to consign, to them upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors. *McCoy v. Cincinnati, etc., R. R. Co.*, 18 Fed. Rep. 3.

The case of *Andenried v. Phil. & Reading R. R. Co.*, 68 Pa. St. 370, involves an interesting question of the obligation of a railroad in regard to terminal facilities. In that case it was alleged that the plaintiff was a shipper of coal over defendant road, that it had for many years allotted to shippers of coal certain spaces or parts of a wharf owned by the road at its terminus on the

Delaware River; that such wharfage facility was necessary to the plaintiff for the reason that the coal was to be shipped in boats and had to lie on the wharf until it could be loaded on the boats; that defendant regularly furnished such wharfage facilities to all shippers of coal over its road, and its wharf was large enough to furnish such facilities to all shippers; that plaintiff had formerly enjoyed such facilities, but that the company had cut them off in order to coerce him as to another matter in dispute between them. Plaintiff sought to enjoin defendant from refusing him such facilities. Sharwood, J., on p. 379, says: "It is very doubtful whether the defendants, under their charter, are bound to provide any wharf accommodations for the coal dealers at Port Richmond (the terminal point on the Delaware River) and equally doubtful whether, having done so to a limited extent, not sufficient to supply the entire business, they are subject to any trust to use or dispose of that property in any particular way." Again on p. 380 he says: "Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to any one is inconsistent with the rights of all others. This was not transportation, but wharfage, the nature of which requires exclusive possession temporarily. The railroad company as trustees of the public have a necessary discretion in the management of such interests, and the motives of their proceeding cannot be reviewed by the court." *Audenried v. Phil. & Reading R. Co.*, 68 Pa. St. 370.

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## WOOD

v.

CHICAGO, M. AND ST. P. R. Co.

(*Advance Case, Iowa. June 18, 1885.*)

A freight agent having power to contract for the carriage of freight agreed with a party to furnish cars at a given point on a certain day. He then telegraphed to headquarters for the cars which were not furnished. In a suit for breach of contract,

*Held*, that there was nothing in the above evidence to show that the agent had power to contract to furnish special cars, or that he was held out to the public by the railroad company as having such power.

APPEAL from Delaware district court.

This case was before the court at a former term. For a statement of the controversy, see 59 Iowa, 196; s.c., 6 Am. and Eng. R. R. Cas. 314. Upon a trial in the district court there was a verdict and judgment for the plaintiff, and the defendant appeals.

*Noble & Updegraff* and *W. Hoyt* for appellant.

*Blair & Morris* for appellee.

SEEVERS, J.—The plaintiff sought to recover damages because  
FACTS. the defendant had failed to deliver cars for the transportation of potatoes from Enfield, a station on the defendant's road, to Dennison, Texas. The contract was made with the defendant's local agent, and was to the effect, as the plaintiff claimed,

that the cars should be at the station on a named day, and that the defendant failed to have them there by the contract time, and thereby the potatoes were frozen, and the plaintiff suffered damages. It was a material question on the trial whether the agent had the authority to make the contract in question. Counsel for the respective parties substantially agree that the court submitted the case to the jury on the theory—first, that there was evidence to show that the agent had authority to contract; or, second, that there was such evidence that the defendant had ratified the contract; or, third, that the defendant had held the agent out to the public as having authority to enter into contracts like the one in question.

1. The first two questions will be considered together, because it seems to us, if we correctly apprehend the argument of counsel, that appellee relies on the same evidence to establish that the agent had authority to contract, and also that the defendant, with knowledge, ratified it, if he in fact did not have such authority. The agent testifies that he had no such authority, but he also testified that "in the first conversation he [meaning plaintiff] applied for a rate to Dennison, Texas. I told him I would get him a rate. I applied for a rate to the general freight agent, Fred. Wild, of Racine, Wisconsin. I received rates on those two car-loads of potatoes from Mr. Wild." And the agent wrote the plaintiff as follows: "Can give you to-day rate of 83 cents per 100 pounds on a car-load of 400 bushels of potatoes, Enfield to Dennison, Texas. Don't know how long this rate will be good. It is liable to advance any day."

AGENT'S AUTHORITY TO CONTRACT FOR CARS; RATIFICATION.

It may be conceded that the agent had authority to contract for transportation of two car-loads of potatoes from Enfield to Dennison, Texas, at 83 cents per hundred pounds, but this has no tendency to prove the agent had authority to contract that the cars should be delivered at Enfield on a named day. The plaintiff, having accepted the rate as indicated in the agent's letter, claims that he made a contract that the cars for the transportation of the potatoes should be provided by the defendant and be at Enfield on a named day, and it is on this contract he seeks to recover. The agent telegraphed the defendant's train-despatcher for the cars, and testified that he ordered them to be at Enfield on a day named, but the cars were not so delivered. The fact that the agent telegraphed for the cars, and ordered them to be at Enfield by a certain time, has no tendency to prove he had authority to so contract, nor has it a tendency to prove that he had done so. But it is said that such evidence tends to show that defendant had knowledge of the agreement made by the agent on the same day, and immediately after it was made. All the agent did was to telegraph for cars, and direct them to be at Enfield at a certain time. This, clearly, in our judgment, has no tendency to show the agent had contracted that the cars should be there at any certain time. We think there

was no evidence tending to show the agent had the power to contract, or that the defendant, with or without knowledge, ratified the alleged contract made with the agent.

2. Did the defendant hold the agent out to the public as one having authority to enter into such contract as the one in question? Some three witnesses testified they were shippers of stock, and that they would say to the agent: "I want to ship two cars of stock or a load of hogs to-morrow or day after to-morrow, as the case might be. He would generally say, 'All right.' As a rule, we generally got the cars the day we asked for them. This evidence fails to show any authority on the agent's part to contract for cars, or that he was so held out by the defendant to the public. Certain parties said to the agent they wanted cars at a certain time; he replied "All right;" and generally the cars were ready at the time they were wanted. This shows merely that the agent made efforts to, and did, obtain the cars. We suppose it was his duty to do so if he could; and the evidence shows that he made efforts in this case, but failed. In other cases he succeeded; but clearly this evidence, in our judgment, does not tend to prove that the agent had authority to contract that the cars should be at the station on a particular day. The court erred in not directing the jury to find for the defendant. Reversed.

**Station Agents' Authority—General Police Power—Contracts.**—The business of railways being conducted by agents, there is necessarily a large delegation of authority to them. Thus, exercising the police power of the company appointing them, they may make reasonable regulations for the conduct of passengers and others having business at their stations. *Commonwealth v. Power*, 7 Met. 596. They may also contract for the transportation of freight both as to rates and time of delivery. *Pruitt v. Hannibal & St. J. R. R. Co.*, 62 Mo. 527; *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455.

**What Station Agents Cannot Do.**—Station agents will not be presumed to have authority to bind the company by a contract beyond its line; but it is bound by a contract entered into by him to deliver goods at an unusual place upon its own line. *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Grover & Baker S. M. Co. v. Mo. Pac. Ry. Co.*, 70 Mo. 672; *Mann v. Birchard*, 40 Vt. 326; *Phillips v. North Carolina R. R. Co.*, 78 N. C. 294; *Cummings v. Dayton, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cases 36 (Ind.); *Webber v. Great Western R. R. Co.*, 3 H. & C. 771. But a general agent has authority to contract for the delivering of goods beyond the company's line. But the fact that the goods were billed through or that freight was paid in advance will not amount to such a contract. *Armstrong v. Grand Trunk R. R. Co.*, 2 P. & B. (N. B.) 445; *Mullarky v. Philadelphia, etc., R. R. Co.*, 9 Phila. (Penn.) 114.

In an action for damages against a railroad company, where it appeared that the plaintiff had employed one C., who was a depot agent of the defendant, to purchase cotton for him, and to hold and ship it under his directions, it was held that C., in so dealing in cotton for the plaintiff, acted solely as the plaintiff's agent, and there was no liability on the defendant from any loss from the failure of C. to perform his duty as such agent. The law does not favor double agencies. *Sumner v. Charlotte, Columbia & Augusta R. R. Co.*, 78 N. C. 289.

## SOUTH AND NORTH ALABAMA R. R. Co.

v.

WOOD.

*(74 Alabama Reports, 449.)*

The courts cannot take judicial knowledge of the rule for the measurement of corn in the shuck, nor declare that a railroad car twenty-six feet long, eight feet wide, and four feet high, cannot hold three hundred bushels of corn in the shuck.

APPEAL from the Circuit Court of Blount.

See a report of this case in 9 Am. & Eng. R. R. Cas. 419, and 16 Am. & Eng. R. R. Cas. 267.

This action was brought by Edmund A. Wood against the appellant, a domestic corporation; and was commenced before a justice of the peace, on the 12th July, 1876. The complaint, filed in the Circuit Court on appeal, claimed seventy-five dollars as damages for the failure to deliver certain goods, the property of the plaintiff, viz., "seventy-four bushels of corn, received by said defendant as a common carrier, to be delivered to L. K. Moss, at Jemison Station, Alabama, for a reward; which the defendant failed to do." The case has been several times tried, each trial resulting in a verdict and judgment for the plaintiff; but, on appeal to this court, each of these judgments was reversed, and the cause was remanded.—See the reports of the case, in 66 Ala. 167, and 71 Ala. 215.

On the last trial, as the bill of exceptions now shows, the plaintiff proved that he purchased from one Copeland, near Blountsville, in said county, 300 bushels of corn in the shuck, and employed said Copeland and others to haul the corn to the defendant's depot at Bangor, and there deliver it to the defendant, to be transported on the defendant's cars to Jemison Station, consigned to L. K. Moss, who lived near that station on the defendant's road; and the plaintiff's witnesses testified to their delivery of the corn at Bangor to one Musgrove, the defendant's agent, in one of the defendant's cars, and to their measurement of the corn as delivered. These witnesses testified "that the corn was of good quality, and reasonably well slip-shucked;" that the full quantity, 300 bushels, was delivered; that they measured it by a tub, or barrel, "which was shucked and shelled out, and found to contain one bushel, one peck and a half," but was counted as containing one bushel and one peck; that the car, when all the corn was delivered, was about two-thirds full, and was then locked by said Musgrove, the defendant's agent. Other witnesses for the plaintiff testified that when

the car was opened at Smith's Mill (where said Moss lived), about eight days afterwards, and the corn was delivered to said Moss, "the car was not over half-full, and the corn measured out but a fraction over 224 bushels." Said Musgrove testified, as a witness for defendant, that an ordinary car-load of corn, shipped in the shuck, would contain from 285 to 300 bushels, and that he so informed plaintiff while negotiating for the shipment of the corn; and the conductor of the train by which the corn was shipped, testifying as a witness for the defendant, stated that the car was "twenty-six (26) feet long in the clear, eight (8) feet wide in the clear, and about six (6) feet six (6) inches high in the middle, but not so high at the sides." The case seems to have turned on the question, how much corn was delivered by the plaintiff on the car at Bangor, for shipment to Moss at Jemison; the defendant contending that the full quantity received was delivered to said Moss. The defendant requested the court to give several charges to the jury, seven in number, each asserting in substance, but in varying phraseology, that a car of the dimensions stated could not contain 300 bushels, and that if the car was only two-thirds full, when all of the plaintiff's corn had been placed in it, no more than 225 bushels could have been received by the defendant. The refusal of these several charges is now assigned as error.

*Thos. G. Jones, with Jno. W. Inzer, for the appellant.*

STONE, J.—Much that enters into and shapes human transactions is so general and uniform in its operation as to be reducible to a rule. The flow of water, the alteration of the seasons, seed-time and harvest, the operation of mechanical powers, are of this class. So, whether certain language is or not, in its very nature, obscene or insulting; whether a weapon of a particular kind is, or is not, deadly; what effect a serious wound in a vital part will have; what are fermented, and what distilled, spirits; these, and many other factors in judicial determination, are so generally known as to dispense with all proof of them, as a general rule. All men know them, and therefore they need not be proved. This is sometimes called judicial knowledge; frequently, common knowledge.

We do not think, however, that the rule for the measurement of corn in the shuck falls within this class. True, we know that a cubic yard, which consists of twenty-seven cubic feet, cannot contain one hundred bushels of corn in the shuck. Can we know precisely what it will hold? Is there any generally known, inflexible rule on the subject? So much must depend on the variety and quality of the corn, and the quantity of shuck left upon it, that no fixed rule can be declared. Suppose we were to declare that a box car 28x8x4 feet cannot hold 300 bushels of corn in the shuck. Can we, with any proximate

WHAT COURTS  
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certainty, say how much it will contain? A result so variable as this cannot become a rule, and hence cannot become a subject of judicial cognizance. As we said, when this case was before us at a former term (71 Ala. 215), "we have nothing to do with these questions. The jury found there was a loss, and we can only inquire whether the law for their government was correctly given in charge to them."—Whar. Ev. §§ 329 *et seq.*

There is no error in the record, and the judgment of the Circuit Court is affirmed.

See South & North Alabama R. Co. v. Wood 18 Am. & Eng. R. R. Cas. 684; and 16 Am. & Eng. R. R. Cas. 272.

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### OLD COLONY R. R. Co.

v.

WILDER.

(187 *Massachusetts Reports*, 586.)

An action by a common carrier against the consignee of goods, for the amount of freight charges, was submitted to the Superior Court upon an agreed statement of facts, which showed that the consignee ordered the goods of the consignor at a certain price deliverable at L.; that the consignor marked the goods, "Collect freight charges at other end;" and that the goods were delivered to the consignee at L. without a demand by the carrier for the amount of such charges, and without an express promise by the consignee to pay them; but did not show whether the consignee accepted the goods, knowing that the carrier looked to him for the payment of the freight. *Held*, that the case stated was imperfect, in failing to state a vital fact, and should be discharged.

*C. S. Lilley* for plaintiff.

*N. D. Pratt* for defendant.

MOERTON, C. J.—This case was submitted to the Superior Court, and after judgment for the plaintiff, to this court, on FACTS. appeal, upon an agreed statement of facts. The defendant ordered a car-load of tow of a third person in Ohio, at  $1\frac{1}{2}$  cents per pound, "delivered in Lowell, Mass." The consignor delivered the tow to a transportation company with which the plaintiff corporation is connected, to be carried to Lowell, directed to the defendant, and marked, "Collect freight charges at other end." The plaintiff carried the tow to Lowell, and delivered it to the defendant, who used it in his business. It is admitted that the defendant never expressly promised to pay the freight. If he is liable to the plaintiff, therefore, it can only be upon the ground of an implied promise springing out of his acceptance of the tow.

It is settled that when goods are carried by a carrier under a bill of lading, by which they are to be delivered to a consignee, "he paying freight therefor," if the consignee accepts the goods under the bill of lading, the law implies a promise that he will pay the freight. So, if goods are carried by land, and the consignee accepts the goods knowing that the carrier looks to him for the charges of carriage, he thereby impliedly promises to pay such charges. This is on the principle that he who accepts a thing which he knows to be subject to a duty or charge which he is expected to pay, thereby contracts by implication to take the duty or charge on himself. *Boston & Maine R. R. v. Whitcher*, 1 Allen, 497; *Blanchard v. Page*, 8 Gray, 281.

In the case at bar, if the defendant accepted the tow knowing that the plaintiff looked to him for the freight, the law would imply a promise by him to pay it. If he had not such knowledge, no promise would be implied. The parties have failed to agree upon this vital fact. It is agreed that the plaintiff did not demand the freight of him when the tow was delivered. The fact that the tow was marked, "Collect freight charges at other end," is evidence that the defendant knew that he was expected to pay the charges. But it is not conclusive evidence. Whether it is a fair inference that it attracted the defendant's notice might depend upon the manner and character of the marking, and other evidence.

As the agreed statement of facts is imperfect, the question is what disposition should be made of the case.

The cases which have been before this court upon agreed facts or cases stated are numerous, and, as there appears to be a want of uniformity in the decisions, or rather in the expressions used by the justices in delivering the opinions, it is well to state the principles upon which the court proceeds in dealing with such cases.

It has always been the law in this Commonwealth, that parties could submit a case to an inferior court upon "a case stated," and that an appeal lay from the judgment thereon of such court to the Supreme Judicial Court. The case stated becomes a part of the record, somewhat in the nature of a special verdict. The St. of 1817, c. 185, and the St. of 1820, c. 79, establishing the Court of Common Pleas, recognized and saved the right of appeal upon a "case stated." The Revised Statutes directly provided that, "when an action is submitted to the determination of the Court of Common Pleas, upon a case stated by the parties, either party may appeal from the judgment, unless it is agreed that the judgment of the Court of Common Pleas shall be final." Rev. Sts. c. 82, § 11. The St. of 1840, c. 87, provides that either party may appeal from any judgment founded upon matter of law apparent on the record. A case stated

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is not directly mentioned in that statute, but it is clear that it was not intended to take away the right of appeal from a judgment upon a case stated; and such right is recognized in the General Statutes and in the Public Statutes. Gen. Sts. c. 112, § 5. Pub. Sts. c. 150, § 7. It has therefore constantly been held by this court that either party had the right of appeal to this court from the judgment of the Court of Common Pleas or the Superior Court, upon a proper case stated. *Hovey v. Crane*, 10 Pick. 440; *Commonwealth v. Cutter*, 13 Allen, 393.

When an action is submitted upon a statement of facts, which contains a clause that the court may draw any inferences of fact from the facts and evidence stated, this FINDINGS OF COURT CONCLUSIVE AS TO FACTS. court cannot inquire whether the inferences of fact drawn by the inferior court are correct, its judgment being conclusive upon such findings of fact. *Cochrane v. Boston*, 1 Allen, 480. *Charlton v. Donnell*, 100 Mass. 229. Under our present system, in an action at law, an appeal brings to this court only questions of law, and never any questions of fact.

When an action is submitted to the Superior Court upon a case stated, containing no clause authorizing the court to draw inferences of fact, the only question presented JUDGMENT NOT GIVEN ON DISPUTED FACTS. by it is the question of law whether, upon the facts stated, the plaintiff has made a case which entitles him to judgment. Unless, upon such facts, with the inevitable inferences, or, in other words, such inferences as the law draws from them, a case is made out, the court would consider that the plaintiff has not sustained the burden of proof, and therefore is not entitled to judgment. But neither the Superior Court in the first instance, nor this court upon appeal, has the right to found its judgment upon any disputable inferences of fact. This view of the nature of a case stated is sustained by other courts. *Byam v. Bullard*, 1 Curt. C. C. 100; *Diehl v. Ihrie*, 3 Whart. 143; *Kinsley v. Coyle*, 58 Penn. St. 461.

We think the decisions of this court are all consistent with this view, though, as we have before stated, some of the expressions in the opinions would seem to imply that the court had the right to found its judgment upon inferences of fact which it might draw from the facts stated. But it is often found that a case stated is imperfect, in failing to state some fact which is essential to the determination of the rights of the parties. In such cases, if it appears that the facts stated are all that the plaintiff is able to prove, and they are insufficient to establish his case, the court will enter judgment against him, upon the doctrine of the burden of proof. But if it seems that the needed fact is inadvertently omitted, or is a fact which is susceptible of proof, one way or the other, the usual course is for this court to discharge the case stated, and remand the unsettled question of fact to be tried in the Superior Court, by the proper tribunal. *Gregory v. Pierce*, 4 Met.

478; *Lefavour v. Homan*, 3 Allen, 354; *Morse v. Mason*, 103 Mass. 560; *Meserve v. Andrews*, 104 Mass. 360.

In the action before us the case stated is imperfect. The vital question whether the defendant accepted the tow knowing that the plaintiff looked to him for payment of the freight is left undetermined. This is plainly a question of fact, and it is clear that evidence tending to decide it is within the reach of the parties. It seems to us that, in order fairly to preserve the rights of the parties, this question should be tried in the Superior Court; and therefore that the case stated should be discharged.

Ordered accordingly.

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OSGOOD

v.

CONCORD R. R. Co.

(*Advance Case, New Hampshire. March 18, 1885.*)

If a railroad charges and receives for transporting a car-load of merchandise to the station on its road where it delivers the goods, and they are accepted by the consignee, more than it charges for transporting the same a greater distance, it is liable to the penalty imposed by chapter 55, Laws of 1859, although by the original contract the merchandise was to be transported to a more distant station.

DEBT for a penalty alleged to have been incurred by the defendants June 20, 1881, under chapter 55, Laws of 1879, by charging a greater sum for transporting a car-load of corn from Concord to Suncook than was charged for transporting the same from Concord to Hooksett, a greater distance. Facts found by the court.

June 20, 1881, the defendants owned and operated a railroad from Concord to Nashua, located on the west bank of Merrimack River, between Concord and Hooksett. They also operated a railroad on the east side of the river between Concord and Hooksett, having a station at Suncook for the delivery of freight; on that day they hauled from Concord to Suncook, and delivered to the plaintiffs, a car-load of corn bought by the plaintiffs through Barrow & Co., of Concord, in Ogdensburg, N. Y., and forwarded over several other roads to Concord, where the defendants received it. The roads between Ogdensburg and Boston, the defendants being one, formed a continuous line for the transportation of merchandise to billing points on the line, called the "National Despatch Line," having a common agent at Ogdensburg, with authority from each road to make contracts for the transportation of merchandise from Ogdensburg to the several billing stations on the

whole line and to fix the rate therefor to be divided between the roads doing the service; also with authority to fix or establish billing stations on the line. In 1881 Hooksett was, and Suncook was not, a billing point on the defendants' road for grain forwarded from Ogdensburg by this through line. Hooksett was made a billing point by the agent who represented the whole line from Ogdensburg to Boston, and the rate of transportation from Ogdensburg to Hooksett was fixed by him. Full car-loads of corn were forwarded from Ogdensburg through to billing points only on the line. When these trains reached Concord, cars for billing stations on the defendants' road were detached and forwarded by a way train via Suncook, while the through trains were forwarded by the main line on the west side of the river. The agent of the Despatch Line at Ogdensburg refused to bill cars to Suncook, and a person having grain to be forwarded from Ogdensburg to Suncook was compelled to accept a contract for delivery at Concord or Hooksett. The distance from Concord to Hooksett via Suncook is nine and a half miles, and about the same over the main line. The distance from Concord to Suncook is seven miles. In June, 1881, the tariff on corn was four cents per one hundred pounds from Concord to Suncook, and the same from Concord to Hooksett, and from Hooksett to Suncook two cents per one hundred pounds.

The car in question was detached from the through train at Concord, and forwarded by the way freight train to Suncook, where it was left, and was not taken to Hooksett at all.

The charges for the carriage of the corn from Ogdensburg to Hooksett was \$32.35, as fixed by the common agent of all the roads, which sum included the defendants' share for the carriage of the corn from Concord to Hooksett. The freight bill forwarded from Hooksett to Suncook contained a charge of \$5.60 for transportation of the same car-load of corn from Hooksett to Suncook, and \$32.25 charged as expense, making a total of \$37.95 charged for the transportation of the car-load of corn from Ogdensburg to Suncook, which sum the plaintiffs were required to pay, and did pay, to the defendants' station agent at Suncook. The charge was the same that the plaintiffs would have been required to pay, according to the tariff rates, if the corn had been carried to Hooksett (to which place it was billed), and had then been forwarded to Suncook. The court held upon the foregoing facts that the plaintiffs were entitled to recover, and the defendants excepted.

Chase & Streeter for defendants.

Copeland & Jones for plaintiffs.

CARPENTER, J.—The statute provides that "no railroad owned or operated in this State shall charge a higher tariff on like classes of freight by the car-load, when delivered at any station

FACTS.

on its line, than is charged to deliver the same at any station on the road where the transportation is for a greater distance," or, more briefly expressed, no railroad shall charge more for transporting freight by the car-load any distance than it charges for transporting the same a greater distance, and imposes a fine for violating its provisions, to be recovered in an action for debt. Laws of 1879, chap. 55. This, excluding the provision for a penalty, is substantially a re-enactment of the common law. *McDuffee v. R. R.*, 52 N. H. 430, 457; *R. R. v. Forsaith*, 59 id. 122. The railroad on the west bank of the river to Hooksett, and the railroad to Hooksett by way of Suncook, are both operated by the defendants, and for the purposes of this question are to be treated as parts of the same road. Gen. Laws, chap. 159, § 1; *Pierce v. Concord R. R.*, 51 N. H. 590. The distance from Concord to Suncook is seven miles, and to Hooksett nine and one half miles. The defendants charged for transporting the car-load of corn from Ogdensburg to Hooksett \$32.35, and to Suncook \$37.95. Whatever part of the whole sum charged was appropriated for the freight over other roads, the defendants charged and received for transporting the car-load upon their own road from Concord to Suncook \$5.60 more than they charged for transporting the same the greater distance from Concord to Hooksett. A more striking instance of the mischief the statute was intended to remedy could hardly be presented. The defendants were not a party to and have no concern with the agreement of the vendors to deliver the corn to plaintiffs free of expense at Hooksett. Their own contract to transport the corn to Hooksett does not relieve them from liability. If they had performed that contract and insisted upon the plaintiffs' taking a delivery of the corn at Hooksett, it may be that there would have been no just ground of complaint. But they did not do so. By their transportation of the corn to Suncook, and the plaintiffs' acceptance of it there instead of at Hooksett, the original contract was abandoned, and in its place a new one to haul it to Suncook was substituted, under which the service was rendered and the right to freight accrued. The defendants cannot treat the contract as rescinded so far as it relates to the service to be rendered, and in force for the purpose of measuring their compensation. Whether, upon a contract to haul a car-load of merchandise from Concord to Suncook by way of Hooksett, the defendants can or cannot, under the statute, properly charge a greater sum than their rate to Hooksett, either in case they literally perform the contract or in case they in fact haul it by the direct and shorter route to Suncook, are questions which need not be determined, because the case shows no such contract.

In *Commonwealth v. Worcester and Nashua R. R.*, 124 Mass. 561, the question rose upon a demurrer, and the declaration did

CONTRACT  
ABANDONED  
BOTH AS TO  
SERVICE AND  
COMPENSATION.

not show that the defendants charged or received a greater sum than the statute allowed. The ruling in regard to the statute of limitations was correct.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

**Statutes Prohibiting Overcharges—Constitutionality.**—The question whether statutes prohibiting railways under penalty from overcharging in freight rates were constitutional came before the Supreme Court of the United States in *Ruggles v. People*, 11 Am. and Eng. R. R. Cas. 49, and it was decided that such a statute was not an impairment of the charter of the company providing that "the board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time by their laws determine, and to levy and collect the same for the use of the said company." See also *I. C. R. R. Co. v. People*, 11 Am. and Eng. R. R. Cas. 55; *Louisville, etc., R. Co. v. R. R. Commissioners*, 16 Am. and Eng. R. R. Cas. 1.

**Construction—Cumulative Remedy—Repeal.**—Such a statute is not intended to deprive a person from whom overcharges are collected from recovering the amount paid him in excess of the rates fixed. He may in an action against the company recover the amount wrongfully collected, and also the penalty. *Fuller v. C. & N. W. R. Co.*, 31 Iowa, 189; *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 645. Nor will a repeal of the statute prevent a recovery for violations which preceded the repeal. *Graham v. C. M. & St. P. R. R. Co.*, 53 Wis. 473. But as to the effect of a repeal there is a distinction to be borne in mind between the right of action for the overcharge, which although connected with the statute is yet based upon common law principles, and the right of action for the mere penalty, a right resting exclusively upon the statute. By repeal of the statute the latter cause of action will be lost. *Smith v. C. & N. W. R. Co.*, 43 Wis. 686.

**Who May Sue.**—Under some statutes the action for the statutory penalty must be brought by the State Railway Commissioner, at his discretion and at the expense of the State, although the penalty was payable, when collected, to the person injured. *Smith v. C. & N. W. R. Co.*, 43 Wis. 686. Where the person aggrieved could sue, he could recover the penalty even though he rode and paid the excessive fare only for the purpose of securing the penalty. *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 645. And the fact that the overcharges were paid without protest, although the plaintiff knew they were overcharges, was held not to prevent a recovery. *Streeter v. C. M. & St. P. R. Co.*, 40 Wis. 294.

**Malice.**—The word "wilfully" used in such a statute does not imply malice. If it be shown that the railroad company designedly omitted to do the things enjoined by the act, it will be sufficient to fix its liability to pay the prescribed penalty. And whether such omission was by design or mistake is a question for the jury. *Fuller v. C. & N. W. R. Co.*, 31 Iowa, 188.

**Measure of Damages.**—In *Graham v. C. M. & St. P. R. Co.*, 53 Wis. 473 it was decided that the measure of damages in an action for a statutory overcharge was the amount overpaid plus interest thereon from the commencement of the action. Where a Wisconsin railway company received plaintiffs' goods from another Wisconsin company, paying as back charges thereon a greater sum than such other company could lawfully charge, and on delivery of the goods to the plaintiffs, collected from them the amount of such back charges together with illegal charges on its own road, it was held that plaintiffs could recover from the defendant only three times the excess in its charges on its own road, and not for the excessive charges of the other company.

Streeter v. C. M. & St. P. R. R. Co., 40 Wis. 294, and in Knight v. Southern Pac. R. Co., 41 Texas, 406, the rate for freight to which the Southern Pacific R. R. Co. is limited by its charter is held to have no reference to any road except that which the company is authorized to build and operate in Texas; and a charge of freight in excess of the limits prescribed by its charter, over a road which the company owns and operates out of Texas, does not violate its charter provisions.

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MERRILL

v.

BOSTON & LOWELL R. R.

(*Advance Case, New Hampshire. March, 1885.*)

Section 4, chapter 101, New Hampshire Laws of 1883, authorize the Railway Commissioners of that State to fix rates within, but not without, its boundaries.

CASE, for refusing the plaintiffs reasonable and equal facilities as expressmen over the defendants' road. The declaration in the sixth count alleged that upon due notice and proceedings had before the Railroad Commissioners of this State and of Massachusetts, the commissioners of this State made an order that the plaintiffs pay the maximum sum of \$7,020 to the defendants as an annual rental for space not exceeding eight by ten feet to the car on the two passenger trains each way daily between Keene and Boston, and two additional trains each way daily between Nashua and Boston, and in addition thereto furnish the defendants with a good and sufficient bond in the sum of \$15,000 for the payment of said rental monthly, and to save said railroad harmless from the loss of money transported by said express company, and from the loss of, or damage to, any articles of merchandise, arising from the negligence or malfeasance of the express company, its agents, or messengers; that the plaintiffs tendered due performance of all the conditions imposed upon them by said order, but that upon request and offer of merchandise and express matter to be carried according to the terms of said order from several stations on the defendants' line in this State to Boston, the defendants refused to obey said order, and refused to receive and carry said merchandise and express matter from places in this State over their lines to Boston, according to their duty in that behalf.

To this count the defendants filed a general demurrer.



*Jeremiah Smith, John H. George and John H. Albin* for defendants.

*C. H. Burns and C. W. Hoitt* for plaintiffs.

BLODGETT, J.—The primary question raised by the demurrer is, whether New Hampshire has conferred upon its board of railroad commissioners authority to regulate charges for transportation on railroads without its territorial limits; for, if it has not, no other question arises in this case. The answer turns upon the construction of section 4, chapter 101, Laws of 1883, because the authority of the commissioners is derived from the last clause in that section, which reads as follows: "It shall be the duty of said board to fix tables of maximum charges for the transportation of passengers and freights upon the several railroads operating within this State, and shall change the same from time to time, as in the judgment of said board the public good may require." That is to say, in the apparent exercise of the legislative power of requiring the reasonable compensation of persons engaged in the public service to be established in judicial proceedings—*State v. Express Co.*, 60 N. H. 219, 261—it is made the duty of the commissioners to fix a tariff of fares and freights upon the several railroads which are in operation within this State, and to this extent power is conferred upon them. But there is no rule of statutory construction by which it can fairly be inferred that the legislative purpose was to invest the commissioners with power to establish rates of transportation beyond the territorial boundaries of this State.

The intention of the legislature, which is the object to be attained, is to be ascertained by their language, unless it is ambiguous. Where there is no ambiguity there is no room for construction. The plain meaning of words cannot be departed from in search of an unexpressed and unimplied intention; therefore, in order to find that the legislature intended to authorize the commissioners to fix prices beyond the State line, their language must say so, either directly, or by distinct implication. But here it does neither, for there is no obscurity whatever in the terms of the statute, and so the legislative intent must be taken as expressed in the words the legislature have used, the fair and natural import of which is that the statute was intended to have a local operation merely. Such, too, is the legal presumption, and such, also, it would be, even though the language were susceptible of a different meaning, because, as a consequence of the equality and sovereignty of States in respect to each other, the laws of a State must presumptively be taken as intended for the government only of persons and things within its territory; and consequently the operation of a law is limited to the State by which it was enacted, unless the intent to give it a more extended operation is clearly indicated.

FACTS.

PLAIN MEANING  
OF STATUTE IS  
TO GOVERN.

NEW HAMPSHIRE  
RAILWAY COM-  
MISSIONERS HAVE  
NO EXTRA-TERRI-  
TORIAL JURISDIC-  
TION.

If, therefore, the statute in question is construed according to the legislative intent, as expressed in the enactment itself, or according to the general presumption that statutes are not intended to have any extra-territorial effect, the reasonable and legitimate conclusion is, that the legislature intended to authorize the commissioners to regulate the rates of transportation upon the railroads within this State only. And if the obvious consequences of giving the statute extra-territorial force are considered, as they properly may be on the question of legislative purpose, the conclusion would seem to be irresistible.

The result of these views is, that the demurrer must be sustained as to so much of the sixth count in the plaintiff's declaration as is based on the commissioners' decision fixing the price of service to be rendered in Massachusetts. If there are any averments in the count aside from such decision which constitute a good cause of action, they cannot be joined with the averment of the decision, and the whole count should be rejected. The issues should not be confused by so extended and prejudicial statement of irrelevant matter.

Demurrer sustained.

All concurred.

**The Constitutionality of Statutes Regulating Freight Rates. Charter Rights.**—When the charter expressly gives the road the right to fix its rates of fare and freight, and there is nothing in the charter providing for supervision or control of rates by the legislature, it is held in most cases that the charter gives the road an absolute right to fix them without limitation or control by the legislature, and that this right cannot be limited or restricted by subsequent legislation. Thus, where a general act for the incorporation of railroads allowed certain rates to companies incorporating under the act, and provided that no reduction should be made in such rates until the company's net income should for ten successive years exceed 10 per cent per annum on its capital stock and the legislature subsequently passed a general act lowering rates below the amount thus fixed, it was held that this act was unconstitutional as infringing charter rights. *Iron R. R. Co. v. Lawrence Furnace Co.*, 29 Ohio St. 208; *contra*, see *Laurel Fork & Sand Hill R. R. Co. v. West Va. Transportation Co.*, 25 W. Va. 324.

So where by charter the road had express power to fix tolls and rates it was held that a statute providing for a railway commission with power to regulate rates was unconstitutional as to such road. *Farmers' Loan, etc., Co. v. Stone*, 18 C. L. J. 472.

The same principle was involved in the following cases: *Illinois Central R. R. Co. v. Stone*, 18 Am. & Eng. R. R. Cas. 416; s. c., 30 Fed. Repr. 468; *Philadelphia, Wilmington & Baltimore R. R. Co. v. Bowers*, 4 Houst. (Del.) 506; *Hamilton v. Keith*, 5 Bush. (Ky.) 458; *Ruggles v. Illinois*, 108 U. S. 526; s. c., 11 Am. & Eng. R. R. Cas. 49.

**Charter Right to Fix Tolls is Subject to Implied Condition that they shall be Reasonable.**—Where there is an express provision in the charter, absolute on its face, empowering the road to fix its rates, it is held that such a clause in the charter is a contract and cannot be impaired by subsequent legislation; but that the right to fix rates is subject to an implied condition that they be reasonable. What is "reasonable" is for the courts—not the legislature—to determine. *Wells, Fargo & Co. v. Oregon Railway & Navigation Co.*, 8

Sawyer, 600; *Ex parte Koehler*, 21 Am. & Eng. R. R. Cas. 52; s. c., 23 Fed. Repr. 529; see *infra*, 52.

In *Ruggles v. The People of the State of Illinois* *infra*, it was held that a provision in a charter empowering a road to fix rates was subject to an implied reservation of right on the part of the legislature to exercise a supervision over rates, and that a statute fixing a maximum rate was therefore not unconstitutional. *Ruggles v. People of State of Illinois*, 91 Ill. 256. The case was appealed to the Supreme Court of the United States, but was decided there on another point. *Ruggles v. Illinois*, 11 Am. & Eng. R. R. Cas. 49.

**When no Charter Provision as to Fixing Rates.**—Where the charter contains no provision on the subject it seems clear that the right on the part of the railroad to fix rates is subject to the control of the legislature. *Blake v. Winona & St. Peter R. R. Co.*, 19 Minn. 418, and cases cited.

**Statute Regulating Rates when Unconstitutional as Regulating Interstate Commerce.**—It seems well settled that transportation of goods from a point in one State to a point in another is interstate commerce within the meaning of the clause in the Federal Constitution giving Congress power to regulate commerce between the States and with foreign nations. *Hardy v. Atchison, Topeka & Santa Fé R. R. Co.*, 18 Am. & Eng. R. R. Cas. 432; *Keiser v. Illinois Central R. R. Co.*, 16 Am. & Eng. R. R. Cas. 40; *Louisville & Nashville R. R. Co. v. Railroad Commissioners of Tennessee*, 6 Am. & Eng. R. R. Cas. 317.

It is equally well settled that the constitutional provision in regard to the regulation of interstate commerce gives exclusive control in this regard to Congress. In the absence of Acts of Congress it is to be assumed that interstate commerce was intended to be free and untrammelled by legislative provisions. *Hardy v. Atchison, Topeka & Santa Fé R. R. Co.*, 18 Am. & Eng. R. R. Cas. 432; *Crandall v. Nevada*, 6 Wall. 35; *The State Freight Tax*, 15 Wall. 232; *Welton v. State of Missouri*, 91 U. S. 275.

From these principles it follows that a State law fixing or regulating the rates to be charged for carriage of freight within the State is unconstitutional in so far as it affects goods being carried through the State, or goods being carried from a point within the State to a point without it, or from a point without the State to a point within. In so far as the carriage within the State is part of a transportation of the goods from one State to another it is a part of interstate commerce and is not subject to State legislative control.

That such a statute is unconstitutional as to contracts for carriage of freight from a point without to a point within the State, see *Hardy v. Atchison, Topeka & Santa Fé R. R. Co.*, 18 Am. & Eng. R. R. Cas. 432; *Illinois Central R. R. Co. v. Stone*, 18 Am. & Eng. R. R. Cas. 416; *Louisville, etc., R. R. Co. v. R. R. Commissioners*, 16 Am. & Eng. R. R. Cas. 1; *Keiser v. Illinois Central R. R. Co.*, 16 Am. & Eng. R. R. Cas. 40; s. c., 5 McCrary, 496; *Farmers' Loan, etc., Co. v. Stone*, 18 C. L. J. 472.

That it is unconstitutional as to transportation of goods from a point within to a point without the State, see *Carton v. Illinois Central R. R. Co.*, 59 Iowa, 148; *Keiser v. Illinois Central R. R. Co.*, 16 Am. & Eng. R. R. Cas. 40; *Illinois Central R. R. Co. v. Stone*, 18 Am. & Eng. R. R. Cas. 416; s. c., 20 Fed. Repr. 468; *Louisville & Nashville R. R. Co. v. R. R. Commissioners of Tenn.*, 16 Am. & Eng. R. R. Cas. 1.

The decision in the case of *Peik v. Chicago & North-western R. R. Co.*, 94 U. S. 164, contains language apparently in conflict with this view, but this decision has never been regarded as a square ruling on the point in question, and has not been followed by federal courts of inferior jurisdiction. (See cases cited in the two preceding paragraphs.)

The language above referred to has been variously explained: see *Hardy v. Atchison, Topeka & Santa Fé R. R. Co.*, 18 Am. & Eng. R. R. Cas. 432;

Illinois Central R. R. Co. v. Stone, 20 Fed. Repr. 468; Louisville & Nashville R. R. Co. v. R. R. Com'rs, 16 Am. & Eng. R. R. Cas. 1; and it seems generally conceded that the Court did not intend to lay down the broad proposition, that statutes regulating freight charges within the State of goods being transported from within the State to points without, or *vice versa*, were not within the constitutional provision in regard to the regulation of interstate commerce. (But see Wabash, St. Louis & Pacific R. R. Co. v. People of State of Illinois, 104 Ill. 476.)

The case of Wabash, St. Louis & Pacific R. R. Co. v. People, *supra*, which seems inconsistent with the principles above stated, may perhaps be explained by the fact that the statute involved in that case did not, apparently, seek to regulate or fix freights, but merely provided a penalty in case of discrimination by the railroad. But unjust discrimination is a tort cognizable by courts of law in the absence of any statute, and it would seem that the legislature, perhaps, had the power to provide a penalty, although it could not define what should constitute an unjust discrimination.

Where a State statute fixing freight rates for carriage within the State is so framed as to apply to the cases of interstate transportation, it seems that the statute must be held wholly unconstitutional—it cannot be supported as to transportation wholly within the State. Louisville & Nashville R. R. Co. v. R. R. Commissioners of Tenn., 16 Am. & Eng. R. R. Cas. 1.

*Ex parte* KOEHLER, Receiver of the O. and C. R. R. Co.

(Advance Case, U. S. Circuit Court, District of Oregon. May 4, 1885.)

A railway corporation formed under the general incorporation act of Oregon has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road which the legislature cannot impair or destroy.

The legislature may prescribe rates of transportation and the same will be presumed to be reasonable until the contrary is shown; but the judiciary are the final judges of what is reasonable or what "impairs" the vested right of the corporation to a reasonable compensation for its services.

The legislature may prohibit any discrimination by a railway corporation between persons or places unless the same is done to enable it to retain or secure business at a point or place where there are competing lines of transportation, and in such case it may charge less for a long haul than a short one in the same direction, so long as the charge for the latter is reasonable.

PETITION for instructions. The opinion states the facts.

John W. Whalley for the petitioner.

DEADY, J.—On January 19, 1885, Mr. Richard Koehler was appointed receiver by this court in the suit of Harrison *et al.* v. The Oregon and California Railway Company *et al.*, of the road of said company, comprising upwards of four hundred miles of track, leading from Portland *via* the east side of the Wallamet River to Ashland, near the southern boundary of this State, with a branch from Albany to Lebanon, and from Portland *via* the west side of said river to Corvallis.

On February 20, 1885, the legislative assembly of the State of

Oregon passed an act entitled "An act to regulate the transportation of passengers and freight by railroad corporations," which will take effect, by operation of the constitution, on May 21.

On April 23 the receiver presented a petition to this court, asking for instructions concerning his duty in the management of said property in certain particulars covered or affected by said act, which he says he is advised by his counsel is unconstitutional and void.

The act is very verbose and unskilfully drawn, but, so far as it relates to the matters about which the receiver seeks direction, it may be briefly stated as follows:

(1.) The fare for the transportation of passengers shall in no case exceed four cents a mile.

(2.) All charges for transporting property shall be reasonable; but the rate charged on January 1, 1885, by any corporation shall be its maximum rate.

(3.) No "greater or less" compensation shall be charged one person than another "for like contemporaneous service" in transporting property.

(4.) No rebate or drawback shall be allowed in any case, except when property is shipped for points beyond the limits of the State.

(5.) Pooling freight or dividing the earnings of "different and competing" railways is prohibited.

(6.) No greater rate shall be charged for carrying similar property a short haul than a long one, in the same direction.

Any person who violates any provision of the act is made liable to the person injured in treble damages and a fine of one thousand dollars.

So far as the act undertakes to fix the charges for carrying passengers and freight it is claimed to be void, on the ground that it impairs the obligation of the contract of the State with the corporation, to the effect that the latter might prescribe and fix its own tolls and charges, contrary to section 10 of Article I. of the national constitution.

By section 2 of Article IX. of the constitution of Oregon, it is provided that "Corporations may be formed under general laws. . . . All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate right."

The Oregon and California Railway Company was formed under the general corporation act passed pursuant to this constitutional provision, on October 14, 1862, which act contains the following section:

Sec. 36. Every corporation formed under this act, for the construction of a railway, as to such road, shall be deemed a common carrier, and shall have power to collect and receive such tolls or

freights for transportation of persons or property thereon as it may prescribe. Or. Laws, 532.

In *Wells, Fargo & Co. v. The O. R. & N. Co.*, 8 Saw. 614; s.c., 16 Am. & Eng. R. R. Cas. 71, 87, this court held that this section only authorized the corporation to charge a reasonable compensation for the transportation of persons and property; but that, so far as it constituted a contract between the State and the corporation, the obligation of which it could not impair by any subsequent legislation.

The conclusion, of course, implies that the right or franchise of the corporation to demand and have a reasonable compensation for the carriage of persons and property is a "vested" one, within the meaning of the constitution of the State, and, therefore, cannot be impaired or destroyed by the legislature under the power to alter, amend, or repeal the general corporation act.

But it is admitted that the right of the corporation to fix its rates and fares is not absolute, and that, if necessary, the legislature may limit the same to what is reasonable. Nor, in my judgment, is the power of the legislature over the subject absolute. It cannot require the corporation to accept less than a reasonable compensation for its services. And while the presumption may be, and doubtless is, that any rate which the legislature may prescribe is a reasonable one, such presumption is not conclusive, and may be overcome by evidence to the contrary in any case when the question arises before the courts.

I am aware that in what are called the Granger Cases, 94 U. S. 155-187, it was practically held that the action of the legislature in fixing the maximum rate of compensation for certain railways was conclusive of the question, and could only be reviewed or reversed at the polls.

But in none of these cases, as I read them, was the power of alteration or repeal reserved to the State, qualified as in Oregon, so that it could not be used "to impair or destroy any vested corporate right." And the contention of the corporations in those cases was, that although the State had reserved to itself the right of repeal without qualification, still the court ought, in justice and right, to so limit its operation as not to allow it to interfere with vested rights, as was suggested by Mr. Chief Justice Shaw, in *Commonwealth v. Essex Company*, 13 Gray, 239. But the court refused to do so, and held, in effect, that under the unqualified power of appeal reserved to the State the legislature might deal with the subject as it pleased, even if it deprived the corporation of all right to compensation for services in the future, and there was no appeal from its action except to the polls; and that if the business and property of the shareholders was thereby destroyed or rendered

valueless they must blame themselves for engaging in a corporate enterprise under such precarious conditions.

Admitting, then, that the legislative assembly has the power to prescribe a maximum rate for the carriage of persons and property, and that such rate is presumed to be reasonable until the contrary is shown, I proceed briefly to consider the matters concerning which the receiver desires instruction.

And first as to the provision fixing the rates for carrying passengers.

There is no sufficient showing that the rate prescribed is not reasonable. The only distinct allegation in the petition to the contrary is that "the actual cost" of carrying "pas-  
COST NOT NECESSARILY BASIS OF RATES.  
 sengers on many portions of the road is in excess of the maximum rates allowed" therefor. But what the effect is upon the receipts for passenger traffic on the road, as a whole, does not appear, and probably cannot be definitely ascertained except by experience.

It is commonly understood that now, and prior to the passage of the act, the fare between Portland and Albany, Lebanon and Corvallis, was four and a half cents a mile, between Albany and Roseburg six cents, and between Roseburg and Ashland seven cents; and on mileage tickets between Portland and Oregon City two cents a mile, between Portland and Albany and Lebanon three cents, and all other points four cents a mile.

Owing to the increased cost of operation and the limited population and travel, it is probably true that a rate which would be reasonable in the Willamette valley would not pay expenses to the south of it. But if the legislature, in fixing the rate, think proper to make it uniform over the whole line, so as to make the more wealthy and populous portion of the State contribute to the locomotion of the inhabitants of the southern portion thereof, I am not prepared to say it has not the power to do so or that the corporation can be heard to object thereto, so long, at least, as the compensation received by it for the carriage of passengers over its road, as a whole, is reasonable.

While the road remains in the hands of a receiver of this court it is not desirable that there should be any conflict between its management and the policy of the State, except when the latter is clearly contrary to the legal right and substantial interest of the road.

For the present the receiver will be instructed to operate the road in this respect in subordination to the act, and if experience shall prove that the rate is insufficient to yield the road, as a whole, a reasonable compensation, the matter may be further considered.

As to the matter of long and short hauls, the question, although *prima facie* one of discrimination, directly involves the right to a reasonable compensation.

RATES FOR LONG  
AND SHORT  
HAULS. COMPE-  
TITION.

I assume that the State has the power to prevent a railway company from discriminating between persons and places for the sake of putting one up or another down, or any other reason than the real exigencies of its business. Such discrimination, it seems to me, is a wanton injustice and may therefore be prohibited. It violates the fundamental maxim, which in effect forbids any one to so use his property as to injure another—*sic utere tuo ut alienum non lædas*.

The provisions of the act that I have condensed in paragraphs 3, 4, and 6 aforesaid are intended to prevent this practice.

But where the discrimination is between places only, and is the result of competition with other lines or means of transportation, the case, I think, is different. For instance, the act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either to points intermediate thereto. But Corvallis is on the river, and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as water craft are allowed to carry at a rate less than the maximum fixed for the railway, they will get all the freight from this point unless the latter is allowed to compete for it. But if to do this it must adopt the water rate for all the points intermediate between Portland and Corvallis, where there is no such competition, it is in effect required to carry freight to and from such points at a less rate than that which the legislature has declared to be reasonable, or else give up the business at Corvallis altogether. And the same result would follow as to Salem and other points on the east and west side lines, where there is convenient access to water transportation.

If the legislature cannot require a railway corporation, formed under the laws of the State, to carry freight for nothing, or at any less rate than a reasonable one, then it necessarily follows that this provision of the act cannot be enforced so far as to prevent the railway from competing with the water craft at Corvallis and other similarly situated points, even if in so doing they are compelled to charge less for a long haul than a short one in the same direction.

It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly for the purpose of putting the one place up or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the legislature has declared to be a reasonable rate or abandon the field, and let its road go to rust.

Nor can the shipper at the non-competing point, or over the short haul, complain, so long as his goods are carried at a reasonable rate.



It is not the fault of the railway that the shipper who does business at a competing point has the advantage of him. It is a natural advantage which he must submit to, unless the legislature will undertake to equalize the matter by prohibiting the carriage of goods by water for a less rate than by rail. And when this is done, the inequalities of distance as well as place may also be overcome by requiring goods to pay the same rate over a short haul as a long one, and then the shipper at Ashland will be as near the market as any one.

As to the interchange of freight with the Oregonian Ry. Co., the case stated in the petition does not seem to be one of pooling freights or dividing earnings, but rather a case of a long haul at a less rate than a short one in the same direction, to meet the contingency of river competition at Ray's or Fulquartz's landing.

INTERCHANGE OF  
FREIGHT NOT A  
POOLING CON-  
TRACT.

Pooling freights or dividing earnings is resorted to by rival and competing lines of railway as a means of avoiding the cutting of rates, which, if persisted in, must result in corporate suicide. It is not apparent how a division of the earnings of two such roads can concern or affect the public, so long as the rate of transportation on them is reasonable. But, assuming, what is not admitted, that the legislature has the power to prohibit the practice, the Oregon and California and the Oregonian railways do not appear to be competing ones, but rather supporting ones—the latter serving as a feeder, branch, or continuation of the former. Nor is the arrangement between them a pooling one, but simply one by which each carries for the other at a fixed price per ton per mile.

There is nothing in the arrangement which prevents the receiver from doing a "like service" for any one else on the same terms, and I have no doubt he would be glad to.

The receiver is instructed :

1. To carry passengers at a rate not exceeding four cents a mile on any portion of the road, and for as much less on the whole or any part thereof as he may think advisable.

2. To charge no more for the carriage of goods than the maximum allowed by the act, nor no more for a short haul than a long one in the same direction, except to and from points where the rate obtainable is affected by water transportation, in which case he may carry at as low a rate as the water craft do, without reference to the length of the haul.

3. To continue the interchange of freight with the Oregonian railway on the footing of the present arrangement as long as he may think advisable ; and,

4. In the discharge of his duties, to otherwise obey and conform to the provisions of the act.

The foregoing contains my present impression of the rights and duties of the receiver in the premises. But, being *ex parte*, of course

it is given subject to further consideration and correction. The receiver is instructed to obey the act for the time being, except in the case of a long haul to or from a point affected by water transportation. If any one considers himself aggrieved by the action of the receiver in this particular, on application to this court leave will be given to bring an action herein against him for damages, so that the matter may be regularly and formally heard and determined.

As the question involved—"Has the corporation a contract with the State for the right to demand and have a reasonable compensation for the carriage of goods?"—is a federal one, it is proper that the action should be brought in this court.

*Ex parte KOEHLER, Receiver, etc.*

*(Advance Case, U. S. Circuit Court, D. Oregon. October 8, 1885.)*

Notwithstanding the Hoult act, a railway corporation may charge less for a long haul than a short one in the same direction, when the rate for the long haul is caused by other lines of transportation competing for business at the point from whence the long haul is made; and where the road of such corporation forms a part of a line of transportation consisting largely of water carriage between two principal points, the rate may be made so as to enable it to compete with another road that constitutes a part of another line of water and railway transportation between the same points.

Under a proviso which excepts from the operation of the Hoult act "goods intended in good faith to be shipped to points beyond the limits of the State," wheat intended by the shipper to be sent directly to San Francisco, or other points beyond the limits of the State, via Portland, may be carried on the O. & C. road from Corvallis to the latter place without reference to said act.

PETITION for instruction under the Hoult act.

*John W. Whalley* for the receiver.

*Wallis Nash* for the Oregon Pacific Ry. Co.

DEADY, J.—By section 4 of the act of February 20, 1885, it is  
FACTS. declared unlawful for any person engaged in the transportation of property by railway in this State to charge or receive any greater compensation for a short haul than a longer one in the same direction. Sess. Laws, 39. On April 23d, Mr. Koehler, the receiver of the road of the Oregon & California Ry. Co., presented a petition to this court asking for instructions concerning his right and duty, as such receiver under the provisions of said act, whereupon said receiver was instructed, among other things, as follows:

"To charge no more for the transportation of goods than the maximum allowed by the act, nor no more for a short haul than a long one in the same direction, except to and from points where

the rate obtainable is affected by water transportation; in which case he may carry at as low a rate as the water-craft do, without reference to the length of the haul." *Ex parte Koehler*, 23 Fed. Rep. 529.

And now said receiver asks for further instructions under said section 4 on a state of facts which has arisen since that date. From the present petition it appears that the Oregon Pacific Ry. Co. has lately completed a road from Yaquina bay to Corvallis, and is now engaged in the transportation of freight and passengers thereon between said points; that in connection therewith an ocean steamer is run between Yaquina bay and San Francisco, "thus forming a line of transportation from Corvallis, in the centre of the Wallamet valley to San Francisco," making Corvallis a competing point for railway and ocean transportation of goods exported from or imported into the State; and that this fact necessarily affects the rate of transportation obtainable at other points capable of being reached by water-craft from Corvallis.

By leave of the court, the counsel for the Oregon Pacific was heard on the petition in opposition to counsel for the receiver.

It does not appear as distinctly from the petition as it should, but it was admitted on the argument by counsel, that the Oregon Pacific is carrying wheat from Corvallis to Yaquina bay, a distance of 72 miles, for \$2.60 per ton, from whence it is carried by steamer to San Francisco for \$1.90 per ton, or \$4.50 over the whole route; while the receiver is carrying it on the road of the Oregon & California Co., from Corvallis to Portland, a distance of 98 miles, for \$3.20 a ton, from whence it is carried by steamer to San Francisco for \$2.50 per ton, or \$5.70 over the whole route. From this it appears that there is in fact a competition between these two roads, at Corvallis, for the transportation of Oregon wheat destined to San Francisco; the one being an important part of the route via Yaquina bay, and the other via the Columbia river. The ocean and railway transportation via Yaquina bay appear to be under one management, and are probably one in interest. The water transportation via the Columbia river route is merely a connecting link with the Oregon & California road, and the management and ownership of each is separate and distinct from that of the other. It follows that the managers of the Yaquina bay route, by making a rate to San Francisco less than the one by the Columbia river, whether the reduction be on the railway or ocean part of such route, or both, may prevent the Oregon & California road from carrying any wheat from Corvallis that is destined to San Francisco, unless the latter is allowed to compete for the same by making a rate between Corvallis and Portland which will at least equalize the cost of transportation by the two routes. Of course the Oregon Pacific has no right to object to this, and the public, who are interested in or dependent upon Corvallis as a shipping

point for the export of wheat, cannot be injured by it, but may be benefited.

The only objection that can be made to this reduction of rate from Corvallis to Portland is that it would be in conflict with the provision of the "Hoult act" concerning short and long hauls, unless the rate is correspondingly reduced at all points between these two places, which is not intended. In *Ex parte Koehler, supra*, I held that while the State had "the power to prevent a railway from discriminating between persons and places, for the sake of putting one up and another down, or for any reason other than the real exigencies of its business," it could not prevent discrimination between places, when it is the result of competition with other lines or means of transportation, and practically thereby deprive a railway company of the right to do business, and render its property comparatively valueless. This ruling governs this case. The Oregon Pacific, by means of its connection with the ocean steamer between Yaquina and San Francisco, is competing at Corvallis with the Oregon & California road for the carrying of wheat to San Francisco, and the receiver of the latter must be allowed to make a rate between Corvallis and Portland that will enable it to secure what it can of the business.

The receiver also asks for instructions under the proviso in section 2 of the act which reads as follows: "The provisions of this act shall not apply to goods intended in good faith to be shipped to points beyond the limits of this State." At the passage of this act there was no railway running out of the State except that of the Oregon Ry. & Navigation Co. And such is still the case. The only reason on which the proviso could have been adopted is that in the carriage of goods out of and beyond the State no injury or inconvenience can result to places within it by reason of a less rate for a long haul than a short one in the same direction. Besides, the transportation of goods to a point without the State is interstate commerce, and beyond the power of the State to regulate. And it can make no difference in principle or result that the goods so shipped are carried over different lines of transportation within the State before passing beyond its limits. It is the intent or purpose of the shipper concerning the destination of the goods at the time of shipment that determines the question whether they are within the exception or not. Whether the road upon which they are first placed is an interstate one or not is immaterial. Any road which leads beyond the limits of the State, or forms a link in a line of extra-state, transportation, upon which goods are shipped with intent to transport them beyond the limits of the State, is so far exempt by the proviso from the operation of the act. *Pacific Coast S. S. Co. v. R. R. Com'rs*, 9 Sawy. 253; s. c., 18 Fed. Rep.

COMPETITION  
WARRANTS RE-  
DUCTION OF  
RATES.

STATE CANNOT  
REGULATE IN-  
TERSTATE  
RATES.

10; The Daniel Ball, 10 Wall. 557. The question in each case is one of fact, and must be determined by its own circumstances. The receiver is therefore instructed that in hauling wheat or other property from Corvallis, or other points on his road—that is, *en route* for San Francisco—or other point beyond the limits of the State, he may make a rate therefor without reference to the act.

**Distance as an Element in Adjusting Railway Rates.**—In a certain general sense it is true that distance should be considered in fixing rates of transportation, as in fact it generally is considered by railway traffic managers and rate makers. But it is not, nor should it be, a universal rule that railway rates should be *pro rata* according to distance. On this point may well be quoted an opinion of the Iowa Railway Commissioners. The case was this:

**Pro Rata Rates.**—Keokuk, Montrose, and Fort Madison, Iowa, are lumber towns on the Mississippi river south of Burlington, which also deals in lumber. Certain other places north of Burlington also handle lumber. The logs are rafted down the Mississippi to supply all these places, the rafting costing more to the southern towns on the river than those farther north, for which reason the northern lumber towns could undersell the southern, and in time drive them from business. To prevent this and protect the southern lumbermen the railways running west from the points named gave them a lower rate on manufactured lumber going west than was given to the northern lumber shippers,—charging, in fact, 12½ cents per 100 from Keokuk, Montrose, Fort Madison, and Burlington, Iowa, to Chariton, Iowa, and similarly to other points West. Lumber shipped from the three towns named all passed through Burlington, whose lumber-dealers claimed that Burlington should have a cheaper rate than that given to the more distant points south. *Held*, that the arrangement was not unreasonable or unjustly discriminative; that distance was not the only element to be considered, and that the railway might protect the Southern lumbermen from being driven from business by giving them a rate as low as Burlington received. As to *pro rata* rates per mile, the commissioners said: "If this rule should govern in the shipment of lumber, it should also in all other freight, and yet, outside of wool, butter, and possibly some other condensed forms of agricultural productions, there is nothing from the soil of Iowa that under a *pro rata* rate would bear transportation to the Atlantic cities. The principle . . . would be fatal to almost every Iowa interest, and if they are correct in their information few interests would suffer more than the lumber manufacturers." *Rand Lumber Co. v. C. B. & Q. R. Co.*, Iowa Ry. Com. Rep., 1882, 551.

Other cases where distance was properly subordinated to other considerations are the following:

**Cost of Handling on Distinct Lines.**—Where the freight is handled and transferred on three distinct lines of road, this adds materially to the cost of carriage, and freight charges may properly be higher than where the freight is carried the same distance but over one line and by one continuous haul. *Hewett v. Kansas C., St. J. & C. B. R. Co.*; Iowa Ry. Com. Rep., 1882, 538.

It is a principle well settled in railway transportation that where freight passes over two distinct lines of road each road is entitled to its local or short rate, and if by an agreed arrangement the freight goes through without rehandling on the same cars the rule is not changed. *Webb v. C. B. & Q. R. Co.*; Iowa Ry. Com. Rep., 1883, 627.

**Parcel Rates.**—It is lawful to charge 50 cents for carrying 80 pounds of fourth-class freight from Cedar Rapids, Iowa, to Jefferson, Iowa, 151 miles, even though the rate from Chicago via Cedar Rapids to Jefferson on first-class freight is but 45 cents per hundred. The reason is this: Freight in small parcels of a few pounds—anything under 100 pounds—on a univer-

sal custom of transportation companies, is always charged a parcel rate, and never a *pro rata* charge of the rate per 100 pounds. This custom long since became a rule of railways, and most of their tariffs provide by rule that "no shipment, however small, will be carried any distance for less than 25 cents; over 150 miles, 50 cents." A similar rule is printed in the State tariffs—as, for example, in Illinois. *Parker v. Chicago & N. W. Ry. Co.*; Iowa Com. Rep., 1882, 457.

**Siding—Rates to Station Beyond, Chargeable.**—A railway company leaving cars at a plug-switch or siding for the accommodation of farmers in the neighborhood may properly charge the rate on shipments from or to such siding which are charged on similar shipments from or to the next station beyond the siding. *Hornaday v. C. R. I. & P. Ry. Co.*; Iowa Ry. Com. Rep., 1882, 481.

**Branch—Heavy Grade—High Rate for Shorter Haul.**—Waukon, Iowa, is on a branch of the C. M. & St. P. Ry., 23 miles long with heavy grades, and an average traffic of but 750 cars per annum. New Albin and Lansing are on the C. M. & St. P. main line or "river road." New Albin is five miles further and Lansing five miles nearer to Chicago than Waukon. Lansing and New Albin rates were each four cents per hundred cheaper to Chicago than Waukon rates. *Held*, considering the small traffic to Waukon, the heavy expensive grades on its branch, and the fact that at New Albin and Lansing the railway had to compete with the Mississippi river, the four cents extra rate to Waukon was not unreasonable. "We think," said the commissioners by their secretary, "we should consider every factor bearing on transportation, and in trying to eliminate one evil take care not to call two into existence. If we deny the competition of the main line with the Mississippi river we refuse it a business that brings money into the general treasury of the company, and justifies it in higher general charges to all points. If we decline to consider "grades" they (we) get away from the cost of the service and abandon a principle that is their only basis of reasoning." *Rosa v. C. M. & St. P. R. Co.*; Iowa Ry. Com. Rep., 1882, 485.

**Branch, Higher Rates On.**—A branch line may also properly be allowed a larger share of a total rate covering branch and main line than its mileage is part of the total mileage. Distance yields to lightness of traffic and other such considerations in such a case as this. This practice is also sanctioned by the Iowa Commissioners, who say: "The practice of allowing to branch and smaller lines, that gather up and distribute the traffic of the main lines, a larger percentage of the entire joint rate than a *pro rata* is universal, and, so far as the commissioners are able to judge, is correct. Without it few branch lines in the State could probably earn operating expenses. The weak lines with a light traffic must derive subsidy from the main lines to whose large business they contribute, otherwise it would be impossible to equalize the rates, and stations on main lines would get very low rates, while the smaller lines would be compelled as a matter of necessity to exact very high rates." *Nye v. B. C. R. & N. R. Co.*; Iowa Ry. Com. Rep., 1883, 787.

**Statute, Competition.**—An examination of section 11, chapter 77, Laws of the XVIIth General Assembly of Iowa, would seem to give color to the idea that the legislature intended by the use of the words "like conditions and similar circumstances" to admit of a less rate at a competing than at a non-competing point, although the latter might be a less distance.

**Short Haul—Inter-state Rates.**—But even though the rate for a short haul should not be greater than that charged for a long haul, where the latter is an inter-state haul the commissioners will not interfere. *Hill v. Minn. & St. L. R. Co.*, Iowa Ry. Com. Rep., 1882, 557; *Armstrong v. I. O. R. Co.*, Iowa Ry. Com. Rep. 1879, 15; *McClintock v. C. M. & St. P. R. Co.*,

Iowa Ry. Com. Rep., 1879, 17; *Crandall v. I. C. R. Co.*, Iowa Ry. Com. Rep., 1881, 132.

**Grouping Stations.**—In *Hill v. Minn. & St. L. R. Co.*, Iowa Ry. Com. Rep., 1882, 557, the commissioners intimate that rates to a nearer non-competing point "should sympathize" with a "cut-rate" at a competing point beyond. Discussing this same subject in another case, the commissioners say: "The true theory of transportation requires that producers be accommodated at the nearest station. The people of no section of the State should be required to travel long distances to do business at a competing point because the rates to the stations nearer to them are so high, comparatively, as to forbid their dealing there. The cost of hauling is not so much in question in this case as neighborhood convenience," and proceeds to suggest that the custom of many leading railway companies to group their stations, charging the same rates to all stations composing a group, be generally adopted. *Light-hall v. I. C. R. Co.*, Iowa R. Com. Rep., 1882, 565.

No authorities are cited in the principal case. No cases exactly in point decided by the courts have been found by the writer. The foregoing statement of the railway commissioners' cases may be appropriately closed with the following forceful argument by Mr. Commissioner Rogers, of New York, in *Foot et al. v. Utica & B. R. R. Co.*, N. Y. Ry. Com. Rep., 1884, Vol. I, p. 104: "The complainants in this case assume that distance alone is the controlling element in the determination of a freight tariff for freights of a like character. Of course the distance an article is carried is a primary element in the rate charged, and freight charges should bear a reasonable relation to distance carried. But if the price for carrying a certain distance is not unreasonable, and yet for a greater distance, for some reason, the same price cannot be obtained, should therefore the road give up the second price entirely?

"Is not half a loaf better than no bread? If such a result is forced upon a road, those at intermediate points would surely, in some way, be obliged to make up the sum lost and be worse off than before. The idea so generally prevalent that a tariff of rates should be based exclusively upon the cost of service, with a reasonable increase added thereto for return on capital invested, and vary, therefore, always in proportion to the distance carried, is abstractly just and would be gladly accepted by the railroads. But it has been proven again and again utterly impracticable. No less authority than Messrs. Allan G. Thurman, E. B. Washburn, and Thomas M. Cooley so state in unqualified words, after an elaborate examination of the subject at the instance of the trunk lines. Railroads, like other corporations or individuals, must sell what they have to sell—viz., transportation—for the best price they can get, provided it is not unreasonable in the sense of extortionate, or prohibitive of the articles transported."

"For instance, the cost of carrying dry-goods over that of carrying coal is exceedingly small, yet if coal were charged at dry-goods rates, or anywhere near them, not a pound of coal would be used. If therefore railroads are obliged to carry coal at a little over the expense of hauling and handling in order to get it into use, they are forced to charge the dry goods considerably over the cost of hauling and handling to make a fair return on their capital. No hardship is inflicted on any one by this course, for the difference between the seven cents and the twenty-five cents per hundred pounds on a man's coat or woman's dress is utterly insignificant, one-half cent, perhaps; whereas on a net ton of coal it is *three dollars and sixty cents*, an utterly prohibitive price."

"Examples can be multiplied, but this single one shows that cost of service is not alone to control, but that nature of article, quantity of shipment, conditions of competition, season of year, value of service rendered, and many other elements must be considered."

See also *Ransome v. Eastern Counties Railroads*, 1 Nev. & Mac. 68,

in which it was said "that in determining whether a railroad company has given undue preference to a particular person the court may look at the fair interests of the company itself, and entertain such questions as whether the company might not carry larger quantities, or for longer distances at lower rates per ton per mile, than smaller quantities, or for shorter distances, so as to derive equal profits to itself."

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BROOKE *et al.*

v.

NEW YORK, L. E. AND W. R. CO.

(*Advance Case, Pennsylvania. October 5, 1885.*)

Where a railway shipping-clerk, colluding with the consignor, issues a fictitious bill of lading, the goods represented by it not having been received, the railway company is liable to an innocent third person deceived thereby. The law of the place of issuing a railway bill of lading governs the rights of parties under it. As between a railway company and third persons the true limit of a railway agent's authority to bind his company is the apparent authority with which he is invested.

ERROR to Court of Common Pleas, Philadelphia County.

In the case stated, submitted for the opinion of the court below, the following facts appear: The plaintiffs, Brooke & Harper, were commission merchants in the city of Philadelphia, having business relations with F. C. Williams, a dealer of produce at Batavia, in the State of New York. On February 15, 1881, P. J. Weiss, the shipping-clerk of the defendant corporation at that place, gave to Williams a bill of lading in the name of the company, purporting to be for a car-load of barley consigned to the plaintiffs. After passing through various hands the bill of lading, with an accompanying draft for \$750, was received by the plaintiffs, and the draft accepted and paid. The barley never arrived, and the bill of lading proved to be fraudulent, Weiss never having received the barley for shipment. Subsequently another car-load of barley was received by the plaintiffs, and although they refused to accept the bill of lading and draft, the railroad company, through mistake, allowed the car to remain on the premises of the plaintiffs, who sold the barley and credited the proceeds to the account of Williams. The plaintiffs then demanded of the corporation defendant compensation for the fictitious bill of lading, which was refused on the ground that Weiss had exceeded his powers in contracting to transport goods which had not been received. The case stated asked that if the court was of opinion that the plaintiffs were entitled to recover the loss sustained by the non-delivery of the barley as specified in their bill of lading, judgment be entered for plaintiffs



for \$300.39, being the balance due upon the whole account ; or if, in the opinion of the court, the defendant has a right to require an appropriation of the proceeds of the barley sold, judgment be entered for plaintiffs for \$105.61, being the difference between the deficiency on the shipment covering the missing car ; but if the court be of opinion that defendant is not liable at all, then judgment for defendant. The case was twice argued before the court below, who entered judgment in favor of the defendants ; his honor, Judge HARR, delivering the opinion.

*J. Rodman Paul, A. Tydney Biddle, and George W. Biddle* for defendants in error. A common carrier is not liable upon a bill of lading fraudulently or negligently issued by a agent without receipt of the goods. *Grant v. Norway*, 10 C. B. 665 ; *Hubbersty v. Ward*, 8 Exch. 330 ; *The Freeman v. Buckingham*, 18 How. 182 ; *Pollard v. Ninton*, 105 U. S. 7 ; *Robinson v. Railroad Co.*, 9 Fed. Rep. 129. Even if this case is to be governed by the law of New York, the plaintiff cannot recover. *Armour v. Railroad Co.*, 65 N. Y. 111. This contract is governed by the law of Pennsylvania, where the contract was to be performed. *Everett v. Vendryes*, 19 N. Y. 486 ; *Dyke v. Erie Ry. Co.*, 45 N. Y. 113 ; *Curtis v. Railroad Co.*, 74 N. Y. 116 ; *Brown v. Railroad*, 34 Leg. Int. 58 ; *Bank v. Shaw*, 2 Wkly. Notes Cas. 542 ; *In re Conrad*, 8 Phila. 147. The plaintiffs can recover no more than the difference in value between the missing car covering the fictitious bill of lading and the car afterwards retained. *McKean v. Wagenblast*, 2 Grant Cas. 462.

STERRETT, J.—The facts upon which the judgment of the court below are based are all embodied in the case stated, and FACTS. therefore it is unnecessary to repeat them. In substance, however, the controlling facts are these : Defendant is a common carrier corporation, and at one of its stations in the State of New York had in its employ P. J. Weiss as shipping-clerk duly authorized to issue bills of lading for goods delivered to the company for shipment over its line. Plaintiffs, as commission merchants in Philadelphia, received over defendant's road from F. C. Williams, of Batavia, New York, several consignments of barley, on which, from time to time, they made advances, by accepting and paying drafts drawn on them by the consignor and attached to the bills of lading signed by Weiss for and on behalf of defendant. All the bills of lading, except one, represented actual consignments of barley ; but that one was fictitious, having been fraudulently issued by Weiss and delivered to Williams for a car-load of barley never delivered to defendant nor shipped to plaintiffs. These facts were, of course, well known to both Weiss and Williams, who conspired to commit the fraud of which plaintiffs were wholly ignorant. Williams made a draft on plaintiffs, and attached it to the fraudulent bill of lading. The draft was duly presented, and, on the faith of the bill

of lading, was paid by plaintiffs ; but, of course, the pretended carload of barley never arrived. Plaintiffs, who thuse became the innocent victims of the fraud to the extent of several hundred dollars, claim that defendant, through whose shipping agent they were defrauded, should make good the loss.

The claim appears to be both reasonable and just, and, notwithstanding the authorities cited in support of the opposite view, we are satisfied it is so. Under the circumstances cited in the case stated, defendant is estopped from denying what its accredited shipping agent asserted in the bill of lading by which plaintiffs, without any fault on their part, were misled to their injury. A question has been raised as to whether, upon the facts presented, the law of this State or that of New York should govern in determining defendant's liability. We are not prepared to admit there is any material difference between the laws of the two States applicable to the case, but if there is, we think it very clear that the law of New York must control, for the reason that the transaction took place in that State. It is well settled that whatever concerns the rights of parties, especially in matters of of contract, is governed by the *lex loci contractus*, while the remedy, including whatever relates to the limitation of actions, etc., must be determined by the *lex fori*; 4 Minor, Inst. 509, 740 ; Bulger v. Roche, 11 Pick. 36. It is said in the last case, "the authorities both from the civil and common law concur in fixing the rule that the nature, validity, and construction of contracts are to be determined by the law of the place where the contract is made ; and all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued." Applying that as the correct principle, the present case is virtually ruled by *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111.

The facts of that case, as stated in the opinion of the court, are distinguishable in principle from those of the case before us. Defendant company's shipping clerk, knowing it had not received from or on account of Michaels any lard whatever, issued and delivered to him certain bills of lading, which were attached by Michaels to his drafts on plaintiffs, who, "upon the faith that defendant had received and would transport to the places specified in the respective bills the lard therein described to be in its possession, paid the sums specified in the respective drafts at the time and in the order in which they were presented ; and thus the question comes up whether the defendant is not estopped from setting up as a defence to this action that its statements, known by its agent at the time of making them to be untrue, were in fact false, and that no lard whatever was received by the railroad company for or on account of Michaels. The true answer to this question is not involved in doubt. The well-recognized principle

RAILWAY COM-  
PANY LIABLE ON  
FICTITIOUS BILL  
OF LADING.

LAW OF PLACE  
OF TRANSACTION  
GOVERNS.

AUTHORITIES  
EXAMINED.

that a party who, by his admissions, has induced a third party to act in a particular manner is not permitted to deny the truth of his admission, if the consequence would be to work an injury to such third party, applies to and governs this case."

Again, in another portion of the opinion, it is said: "Street having power to issue bills direct to consignees for goods actually in the possession of defendant, and the present bills being in no way distinguishable in form from those which were usually employed, he must, as to the plaintiffs acting in good faith, be considered as having the necessary authority. . . . The representations in the bills were made to any one who, in the course of business, might think fit to make advances on the faith of them. There is thus present every element necessary to constitute a case of estoppel *in pais*; a representation made with the knowledge that it might be acted on, and subsequent action upon the faith of it to such an extent that it would injure the plaintiffs if the representation was not made good." The language thus employed in that case may very appropriately be applied to the present one.

The same principle is recognized in *Coventry v. Great Eastern Ry. Co.*, 11 Q. B. Div. 776, the facts of which were briefly these: The railroad company received a consignment of wheat, and issued therefor a delivery order, which came into the hands of B., who obtained advances thereon from plaintiffs. Shortly afterwards the company issued a second delivery order in respect of the same consignment of wheat. The two orders were different, and such as might be reasonably supposed to relate to distinct consignments. On the second order B. obtained further advances from plaintiffs, who were under the belief that the delivery orders related to distinct consignments. B. having afterwards become insolvent, it was held that the company was estopped by the negligence of its agent from showing that the two delivery orders related only to one consignment, and that it was liable to compensate plaintiffs for the loss sustained by them through their advances to B.

It is contended that inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods mentioned therein had actually been given by the railroad company to Weiss, it was not in any manner responsible for his unauthorized act, even as to innocent third parties, who were misled and injured thereby. We cannot assent to this proposition. As between principal and third parties the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but as between the principal and the agent the true limit is the express authority or instruction given to the agent. *Evans*, Ag. 594, 606; *Adams Exp. Co. v. Schlessinger*, 75 Pa. St. 246. The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted

MEASURE OF  
AGENT'S AUTHORITY AS TO  
THIRD PERSONS.

contrary to instructions; and this is expressly the case with officers and agents of corporations. Since a corporation acts only through agents it is bound by its agents' contracts when made ostensibly within the range of their office. One who authorizes another to act for him in a certain class of contracts undertakes for the absence of fraud in the agent acting within the scope of his authority. Whart. Cont. §§ 90, 130, 269.

The authority of an agent to act for and bind his principal will be implied from the accustomed performance by the agent of acts of the same general character for the principal with his knowledge and consent. Evans, Ag. 193, note. These elementary principles are founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in that matter, should be bound by it. Evans, Ag. 591. It is conceded in this case that the company did not authorize the issuance of bills of lading without receipt of the goods; but it put Weiss in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy, as well as the ultimate good of corporations themselves, requires that this should be the rule.

Judgment reversed, and judgment on the case stated in favor of plaintiffs for \$300.39, with interest from May 31, 1881, and costs.

**Fraudulent Bill of Lading—Obligation of Railway Company to Issue Bills of Lading.**—"We know no rule of the common law, and no provision of statute," says the Supreme Court of Massachusetts, "which requires a railroad company to give bills of lading. When such companies transport goods in connection with carriers by sea, it may be a convenient and proper arrangement; but it can only be made essential by contract or custom." Nor is there any rule of law requiring a consignor to take out a bill of lading and send it to the consignee." Johnson v. Stoddard, 100 Mass. 306. But railway carriers commonly do give bills of lading upon request, and generally authorize their freight agents to sign and issue them. Perhaps the custom to give bills of lading is now so universal among railways that they would be held obligated thereby to issue them.

**Limitation of Agents' Authority to issue Bills of Lading.**—But the authority of railway agents to issue bills of lading is subject to this very firmly settled limitation: they are authorized to issue bills of lading only for goods actually received. The question whether or not such a limitation as this exists was presented in England for the first time to the Court of Common Pleas in Grant v. Norway, 2 Eng. Law and Eq. Rep. 337. That case decided that the master of a ship signing a bill of lading for goods which had never been put on board is not to be considered the agent of the owner in that behalf so as to make the latter responsible to an indorsee of the bill for value. Many English cases, following Grant v. Norway, *supra*, hold that a bill of lading so signed is not conclusive against the owner as to the quantity of goods or cargo shipped. Jessel v. Bath, 2 Exchq. (L. R.) 267, and see also Brown v. Powell Daffryn Steam Coal Co., L. R. 10 C. P. 562. The ruling in Grant v. Norway, *supra*, has been followed in this country by the Supreme Court of the United States in Schooner Freeman v. Buckingham, 18 How. 182, wherein it is decided that neither the owner nor the vessel is respon-

sible to an innocent purchaser or holder of a bill of lading signed by the master for goods not actually shipped and intended as an instrument of fraud. "The master," said the court in that case, "has no more an apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises; but the authority in each case arises out of and depends on a particular state of facts; it is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist; and it is incumbent on those who are about to change their condition upon the faith of his authority to ascertain the existence of all the facts upon which his authority depends." *Schooner Freeman v. Buckingham*, 18 How. 182; *S. P. Sears v. Wingate*, 3 Allen, 108; *The Loon*, 7 Blatch. 244; *Fellows v. St. Powell*, 16 La. An. 316; *Dean v. King*, 22 Ohio St. 118; *Louisiana N. Bank v. Lavielle*, 52 Mo. 380.

This is the rule with reference to masters of vessels and maritime bills. Does it not also apply to railways and their agents issuing inland bills? Beyond question it does. Indeed, there seem even stronger reasons why this should be the rule as to railways and their agents than apply to vessels. This point was well developed in *Balto., etc., R. Co. v. Wilkens*, 44 Md. 11. "The master of a ship," said the court in that case, "is necessarily clothed with a real as well as an apparent authority much more extensive than belongs to the station agents of a railroad company. His control over the vessel, his power to make contracts respecting it, his discretion in the use and management of it for the benefit of his owners, on the high seas and in distant ports, reach far beyond those of the latter. A bill of lading signed by him and forwarded by mail oftentimes arrives at the port of destination months before the vessel and cargo, and the necessities as well as the convenience of commercial transactions requiring its transfer, and advances on the faith of it, are much stronger than can possibly exist in dealing with similar instruments in railway transportation. In the latter but a few days usually intervene between the arrival of the bill of lading by mail and the goods by the cars, and, besides this, the telegraph is at hand, affording to any one asked to make advances on the faith of such documents easy and speedy means of ascertaining whether the goods have been in fact laden in the cars or received at the depot of shipment or not. If, therefore, there be any good reason for exempting the owner of a vessel from responsibility for a bill of lading, false in this respect, signed by the master, who is his agent, it must apply, *a fortiori*, to a railway company with respect to the similar acts of its station agents along its line of road."

**Instances of Fraudulent Bills of Lading.**—The rule above formulated has been applied to a receipt given by the agent of a wharfinger purporting to be for goods received at the wharf, when, in fact, they were not received there, *Coleman v. Riches*, 29 Eng. L. & Eq. 323, to receipts by warehousemen for goods not received at the warehouse. *Second Nat'l Bank v. Walbridge*, 19 Ohio St. 419. A railroad company was held not liable for advances made by a commission merchant upon the faith of a fraudulent bill of lading is sued for goods never received. *Balto. & O. R. Co. v. Wilkens*, 44 Md. 11; see also *Stone v. Wabash, St. L. & P. R. Co.*, 9 Brad. 48. The carrier in order to give a valid bill of lading must possess the goods as the goods of the person to whom the bill is issued; if they belong to another person it is not valid. *Pattison v. Culton*, 33 Ind. 240. But a bill of lading given before the goods are received by the carrier will be validated if they are afterwards placed in his possession. *Rowley v. Bigelow*, 12 Pick. 308.

**Conflicting Cases.**—But entirely different views from the foregoing have

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been adopted by a few courts. In Nebraska it has been decided that a railway company is estopped as against a *bona fide* purchaser to deny a bill of lading issued by its authorized agent, although the goods were not received by the company. *Sioux City & P. R. Co. v. First Nat'l Bank*, 10 Neb. 556; s. c., 1 Am. & Eng. R. R. Cas. 278. And in *Armour v. Mich. Cent. R. Co.*, 65 N. Y. 111, defendant's agent, having authority to issue bills of lading upon delivery to him by M of a forged warehouse receipt, gave M bills of lading for the goods mentioned in the receipt, showing that he intended to raise money on the bills, and plaintiff advanced money to M upon the security of the bills. It was *held* that defendants were bound by their agent's acts, and estopped from denying the receipt of the goods. See also *Wichita Savings Bank v. Atchison T. & S. F. R. Co.*, 20 Kans. 519; 20 Am. Ry. Rep. 299; *Miller v. Hannibal and St. Joe R. Co.*, 24 Hun, N. Y. 607, but see same case reversed on appeal, 90 N. Y. 480; s. c., 12 Am. & Eng. R. R. Cas. 90. And in *St. Louis & I. M. R. Co. v. Larned*, 108 Ill. 298, 6 Am. & Eng. R. R. Cas. 436, it is held that where a railroad company gives a bill of lading reciting that the property is then lying in a depot at a certain place, and agrees to forward the same to the consignee, and others advance money on the faith of such bill of lading, which is assigned by the shipper, the railroad company will be estopped, as against such persons, from showing that at the time of giving such bill of lading, and its endorsement, the goods were in the adverse possession of another person, so as to defeat an action brought by the consignee so advancing money on the bill of lading.

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CREAM CITY R. Co.

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. R. Co. *et al.*

(*Advance Case, Wisconsin. April 28, 1884.*)

A common carrier may, by express contract, limit his liability as a carrier, and when he does so he can only be held liable for a loss of goods intrusted to his charge, or for injury to the same while in his possession, upon proof that the loss or injury was the result of the negligence of himself, his agents, or employees.

In constructing a contract limiting the liability of a common carrier the provisions of the contract are not construed liberally in his favor.

The term "carriage" as used in bill of lading *held* not to include a street railroad car.

There being no evidence that the release executed by the shipper in this case was executed by authority of or in behalf of the consignee of the property, it was properly ruled inadmissible as evidence in the action by the consignee for injury to the property.

APPEAL from county court, Milwaukee county.

*Winfield Smith* for respondent.

*John W. Cary, D. S. Wegg, and Burton Hanson* for appellants.

TAYLOR, J.—This action was brought by the respondent, a street  
FACTS. railroad company in the city of Milwaukee, to recover damages for injuries done to a street car while in transit from the

city of New York to the city of Milwaukee. The appellants are the carriers who transported the car from New York to Milwaukee. There is no dispute as to the facts. The car was delivered to one of the appellants in New York in good order. When it arrived in Milwaukee, and before the same was delivered to the respondent, it had been injured. A hole was broken in the rear end of the car, and the sill was broken and split. The amount of damage done to the car, as found by the jury, is not in dispute. The respondent obtained judgment in the county court, and the defendants appeal to this court.

The bill of lading upon which the car was transported from New York to Milwaukee is headed as follows :

**" CANADA SOUTHERN LINE FAST-FREIGHT LINE.**

"From New York, Boston, and all New England points to the west, north-west, and south-west. Through, without transfer, in cars of this line.

"Marks: Cream City R. R. Co., Milwaukee, Wis. (Canada Southern Line. Bill of lading from New York to Milwaukee depot.)

"(Ex. 1 A. K. Rep.)

"No. 413 BROADWAY, NEW YORK, December 2, 1882.

"Received from John Stephenson Company (Limited) in apparent good order (except as noted) the following packages (contents and value unknown), marked as in the margin, viz.: No. —. Two (2) new street cars on wheels, Nos. 61 and 63, covered, fixtures packed inside. Both loaded on one (1) flat car.

"Estimated weight, 20,000 lbs.

"To be forwarded to Milwaukee, Wisconsin.

"It being expressly understood that, in consideration of issuing this through bill of lading and guaranteeing a through rate, the Canada Southern Line reserves the right to forward said goods by any railroad line between point of shipment and destination, and under the following conditions."

Here follow several conditions, none of which are material in the determination of this case, except the following :

"Carriages and sleighs, eggs, furniture, looking-glasses, glass and crockery-ware, acids, machinery, stoves and castings, rough marble, musical instruments, liquors put in glass or earthen-ware, and all other frail and brittle articles, fruit, and all other perishable goods, will only be taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, unless specially agreed in writing to the contrary. . . . The acceptance of this bill of lading, or receipts for goods, made subject to the conditions of this bill of lading, makes this an agreement between the Canada

Southern line and carriers engaged in transporting said goods and all parties interested in the property."

It is claimed by the learned counsel for the appellants that, under this bill of lading the carriers are not liable for any injury done to the plaintiff's street car while in transportation, unless it be affirmatively established by the evidence that the injury was occasioned by the negligence of the carriers, or some one of them, or their agents or servants. This claim for exemption from liability on the part of the appellants is based wholly on the clause in the bill of lading above quoted; and it is insisted that there was no evidence given on the trial, which tended to prove that the injury to the car was caused by the negligence of the carriers, or of their servants, agents, or employees.

It is claimed by the learned counsel for the appellants that a street railroad car is a "carriage" within the meaning of that word as used in said bill of lading, and therefore the carriers are not liable for the injury to the same, except upon clear proof of negligence on their part causing the injury. The law seems to be settled that a common carrier may, by express contract, limit his liability as such carrier; and when he has so limited his liability, he can only be held liable for a loss of goods intrusted to his charge, or for injury to the same while in his possession, upon proof that the loss or injury was the result of the negligence of himself, his agents, or employees.

In construing contracts limiting the liability of common carriers, the provisions of the contract are not to be construed liberally in favor of the carriers. *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 322; and cases cited in brief of the respondent. Under this rule we are clearly of the opinion that the word "carriage," as used in said bill of lading, when considered in connection with the other things from which exemption from liability is sought by the carrier, cannot, except by the most enlarged construction, be held to include a street railroad car. The carriers in this same bill of lading call this thing, which is said to be a "carriage" within the ordinary meaning of that word, a "street railroad car on wheels." They do not designate it as a railroad "carriage," a but "car." To the ordinary mind, in this country at least, the word "carriage" alone does not convey the idea of a railroad car, or of a street railroad car, nor does it even convey the idea of a wheeled vehicle used for the transportation of merchandise or products used in ordinary business. The idea conveyed is a vehicle used for the transportation of persons either for pleasure or business, and drawn by horses or other draught animals over the ordinary streets and highways of the country, and not cars used exclusively upon railroads or street railroads, or street railroads expressly constructed for the use of such cars. As yet in this country the vehicles used for the transporta-

STREET-CAR NOT  
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ROAD COMPANY.



tion of passengers on railroads and street railroads are generally called "cars," and occasionally "coaches;" seldom, if ever, "carriages." The definition given by the older lexicographers of the word "carriage" was of the most general and indefinite kind, but that given by those writing in our own times is more in consonance with the restricted and more definite meaning of the word as understood by people in general.

Johnson, in his dictionary, dating back 130 years, defines the word "carriage" as "a vehicle;" "that in which anything is carried." In later years Worcester defines it as "any vehicle on wheels; especially a vehicle of pleasure, or for the conveyance of passengers." Webster, as "that which carries or conveys on wheels; a vehicle, especially for pleasure or for passengers; sometimes for burdens; as a close-carriage; a gun-carriage." In the Imperial Dictionary, which is the latest authority, "carriage" is defined as "that which carries, especially on wheels; a vehicle. This is a general term for a coach, chariot, chaise, gig, sulky, or other vehicle on wheels,—as a common-carriage on trucks; a block-carriage for mortars; and a truck-carriage. Appropriately the word is applied to a coach, and carts or wagons are rarely or never called carriages." If the definition given by Johnson was the true definition of the word in his time, it will be seen by a reference to the definition in the Imperial Dictionary that its common and ordinary meaning has been restricted to those vehicles which are used for the carriage of persons, such as a coach, etc., and does not include those wheeled vehicles which are used for the carriage of burdens only, such as wagons or carts, and most clearly does not include railroad cars, which can be used only on roads properly constructed for their use. Neither Webster, Worcester, nor the Imperial Dictionary mentions railroad cars as coming within the common and ordinary meaning of the word "carriage."

It is undoubtedly true that the word "carriage" might sometimes be construed to include railway cars and other vehicles not coming under the denomination of coach, chaise, chariot, gig, or sulky. The meaning to be given a word which may be used to designate a variety of things must in all cases depend upon its associations and the subject-matter in relation to which it is used. The association in which the word is found in the bill of lading in question in this case, to our minds, clearly points to a meaning which excludes the idea of a railroad car or street railroad car. All its associates are things either fragile in their nature, or such as are easily damaged by exposure or perishable. Railroad and street cars are not the natural associates of the other articles mentioned in the exemption clause. We must therefore hold that the street car which was injured in this case was not a carriage within the meaning of the bill of lading, and so the plaintiff was entitled to recover upon proof of the injury while in the possession of the defendants as common carriers.

The other question as to whether there was sufficient proof in the case to show negligence on the part of the carriers, which was the cause of the injury, becomes immaterial, and we give no opinion on that subject.

The only other error relied on by the appellants was the alleged error in rejecting the release, as it is termed, given by the shipper of the car to the New York Central R. R. Co. We think the release was properly rejected. The contract for carriage, so far as the plaintiff was concerned, was contained in the bill of lading given for its benefit by the Canada Southern Fast-Freight Line. The release was not made by the plaintiff, nor, so far as the evidence in the case shows, on his behalf by any person authorized by him to make it.

The concluding paragraph of the release shows that it was not made by the consignee, nor on his behalf. It reads as follows: "And in consideration aforesaid, I agree to indemnify and save harmless said company from any and all claims made by any consignee of any of said property for loss or damage thereto, arising from any causes aforesaid, while in the possession or under the control of said company." "1," in this paragraph, evidently means the John Stevenson Company which shipped the cars. It does not act on behalf of the consignee, the plaintiff, nor does it pretend to do so; and, as said above, there is no evidence in the case which tends to show that the John Stevenson Company had any power or authority to bind the plaintiffs by any such contract or release. We find no error in the record.

The judgment of the county court is affirmed.

**Definitions of Carriage.**—"Carriage" is defined as "any vehicle on wheels or runners used for the transportation of persons or goods." *Rap. & Law., Law Dict., "Carriage."* "A carriage is a general term and will include a wagon," *Pardee v. Blanchard*, 19 Johns. N. Y. 444. In *Conway v. Town of Jefferson*, 46 N. H. 521, under a statute which provides for the recovery of damages against a town, for injuries done to the plaintiff's "person or to his team or carriage" by the insufficiency of a highway, it was held that plaintiff may recover for injuries to his sled and load of coal thereon. "By the term carriage," said the court, "they (the legislature) intended to include whatever carried the load, whether upon wheels or runners. A person driving a bicycle may be convicted for violating a statute prohibiting the furious driving of 'carriages.'" "I think," said Miller, J., "the word carriage is large enough to include a machine such as a bicycle which carries the person who gets upon it, and I think that such a person may be said to drive it." *Taylor v. Goodwin*, 4 Q. B. Div. 229. "carriage" in a statute referring to "wagon, cart, or other such carriage" must be taken to refer to vehicles "ejusdem generis." It would not include a "gig." *Danby v. Hunter*, 5 Q. B. 20.

Where one section of an ordinance provides what kinds of vehicles shall be licensed and the next what amounts shall be paid for such licenses, the use of a general term of description in the latter does not enlarge the scope of the former section, but, on the contrary, the general words of the latter are limited by the particular words of the former. *Snyder v. City of North Lawrence*, 8 Kan. 82.

The conductor of a street railroad car is not the driver of a carriage within the meaning of section 6, 1 R. S., N. Y., 696, which makes the owners of carriages running upon the highway for the conveyance of passengers liable for all injuries and damages done by a driver while driving such carriage, whether the act was wilful or negligent. *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122.

The business of a travelling circus is not a trade, and carriages belonging to a circus, and used for carrying the band and other performers in a parade through the town, are not carriages "used solely for the conveyance of any goods or burden in the course of trade," so as to be exempt from duty under 32 and 33 Vict. c. 14, s. 19, subs. 6; *Speak v. Powell*, 9 L. R. Exchqr. 25.

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CASTANOLA *et al.*

v.

MISSOURI PACIFIC R. R. Co.\*

(*Advance Case, U. S. District Court, W. D. Texas. 1885.*)

On February 6, 1884, D. sold to T. 25 hogsheads of tobacco, and shipped them by rail to him, taking two bills of lading, one marked "original," and the other "duplicate." The "duplicate" bill of lading and invoice were transmitted to T., and the "original" was attached to a 60-days draft drawn by D. on T., and sent through a bank for acceptance. T. on receipt of the "duplicate" transferred it by indorsement to C., with whom he had contracted to sell the tobacco, and received payment therefor; and, on presentation of the "original" and draft the next day, refused to accept the draft, and it was returned to D. On February 24, 1884, T. failed, and D. ordered the goods, then in transit, to be stopped. On February 27 and 29, 1884, C. demanded the goods of the railroad company, and was informed that they had been stopped in transit by D. and shipped back to them; whereupon C. sued the company to recover the value of the goods, claiming to be an innocent purchaser for value. *Held*, (1) that the transfer of the "duplicate" bill of lading for value did not carry with it necessarily the title to the goods; and (2) that C. had notice before he paid for the goods, which should have put him on inquiry as to what disposition had been made of the "original" bill of lading, and therefore did not acquire a legal title to the goods that would defeat the right of the consignor to stop them in transit.

TURNER, J.—In this case the plaintiffs sue defendant for the non-delivery of 25 boxes of tobacco. The facts developed by the evidence are substantially as follows: FACTS.

About the last of January, 1884 (I think the 28th), a member of the firm of Turnley Bros. & Co., grocers, residing and doing business at Galveston, Texas, came to this place (San Antonio), and contracted with this plaintiff for 25 boxes of "Drummond Horse-shoe Tobacco." That about the 6th of February thereafter, Turnley Bros. & Co. gave to the agent of the Drummond Tobacco Co. an order for tobacco; 25 boxes to be consigned to Turnley Bros. &

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\* s. c., 24 Fed. Repr. 271. The note appended in this case was originally written by the editor for the Federal Reporter. It is reprinted here, with slight changes, by permission of the West Publishing Company.

Co. at San Antonio, Texas; also a number of boxes to be shipped to them at Galveston. On the 11th day of February the Drummond Co. shipped the tobacco, as ordered by Turnley Bros. & Co., and taking from the railroad company (defendant) two bills of lading, one stamped "Original" and the other "Duplicate." The duplicate bill, together with the invoice, was transmitted to Turnley Bros. & Co., and the original bill of lading was attached to a 60-days draft, drawn by the consignors upon the consignees, and sent through a bank to Turnley Bros. & Co. for acceptance.

Turnley Bros. & Co., upon the receipt of the duplicate bill of lading, delivered the same to plaintiff, indorsed, without date, as follows: "Deliver to M. Castanola & Son." Signed. "Turnley Bros. & Co.,"—which duplicate bill of lading, together with an invoice of the tobacco, amounting to \$270.50, payable in 60 days, or 2 per cent off for cash, reached Castanola & Son, February 20, 1884. On the next day plaintiff remitted to Turnley Bros. & Co. the amount of the invoice, less 2 per cent off. Turnley Bros. & Co. refused to accept the draft attached to the original bill of lading, and same was returned to the Drummond Tobacco Co., and on the 24th of February, 1884, Turnley Bros. & Co. failed, and on that day it became publicly known that they had failed, and the Drummond Tobacco Co. ordered the goods stopped in transit. On the 27th plaintiff presented the duplicate bill of lading to defendant, and was told that they also had a letter from Turnley Bros. & Co., notifying it of the transfer of the tobacco to plaintiffs. On the 29th of the same month, plaintiffs again demanded the tobacco, and were told by the defendant's agent that the goods had been stopped in transit by the Drummond Tobacco Co., and the tobacco shipped back to St. Louis and delivered to the Drummond Tobacco Co. It is evident that Turnley Bros. & Co. were in failing circumstances at the time they gave the order for the goods to the Drummond Tobacco Co.

The plaintiffs bring this suit and seek to recover of defendant the value of the goods, claiming to be an innocent purchaser for value.

The question first presented, then, is, Is the purchaser, in the eyes of the law, the owner of the goods, by virtue of his having the duplicate bill of lading assigned to him, and having paid therefor? The position taken by the defendant is that the duplicate bill of lading does not represent the goods, but the original one does; and plaintiff purchased at his peril, and that no title to the goods passed to the plaintiff; and therefore the Drummond Tobacco Co. rightfully exercised their right of stoppage *in transitu*. If this position be well taken, that ends the controversy. Bills of lading are often spoken of as negotiable. This is not, legally speaking, true. They are for specific articles, and not payable in money, and are not, strictly speaking, negotiable commercial paper. See Daniel, Neg. Inst. (2d Ed.) p.

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660, § 1727. They are assignable, and the bill of lading represents the property; and if the consignor assigns the bill of lading to an innocent purchaser for valuable consideration, the title to the goods passes to the purchaser, and such a sale would defeat the right of stoppage *in transitu* of the consignor. The difficulty arises in determining which is the bill of lading that represents the goods, and the transfer of which carries with it the legal title. They are called original, duplicate original, and triplicate originals. This in one sense is true. They all contain a receipt for the goods by the transportation company, as well as a contract to transport the goods to the place of delivery, and to deliver to the person entitled thereto. See authority last cited, section 1728. It cannot be argued that each one of these bills, independent of the other, represents the goods. If this proposition be conceded, it follows as a logical sequence that either some one of them must represent the goods, or that the three or more (as the case may be), taken together, represent the goods.

In the cases to which my attention has been called the term used is, where the bill of lading has been transferred to an innocent purchaser for value, etc., using the singular number. As I have said, these bills of lading are not strictly negotiable, but were assignable, and in some respect likened in the commercial world to original and duplicate bills of exchange. It will hardly be contended, however, that a prudent man would purchase a duplicate bill of exchange without first having ascertained that the original had not been paid. The fact that the second bill of exchange is presented suggests and gives notice that there is an original, which, if paid, renders the duplicate of no value.

Ought this rule to be applied here, either in determining which is or what constitutes the bill of lading, or with reference to the *bona fides* of the purchaser. It is evident that the consignors did not intend to part with title to the goods unless Turnley Bros. & Co. accepted the draft drawn upon them,—see Daniel, Neg. Inst. (2 Ed.) § 1734; and if this controversy were between the consignors and the consignees there would be but little difficulty.

This case illustrates the facility with which a consignee who is disposed to defraud the consignor can effect his purpose, if it be held that the duplicate bill represents the goods, and that its transfer to a purchaser takes thereby the legal title to the goods. I am unable to find any adjudicated case in point. I am constrained to believe, for the reasons above indicated, that a transfer of a duplicate bill of lading for value does not carry with it the legal title to the goods, and that the purchaser in this case was put upon notice before he paid for these goods, which should have put him upon inquiry as to what disposition had been made of the original bill of lading; and that therefore, under the facts of this case, the plain-

tiff did not acquire the legal title to the goods, such as would defeat the right of the consignor to stop the goods while in transit.

The judgment is therefore for the defendant, with costs.

**Negotiation of "Duplicate" Bill of Lading.**—There is very little authority bearing upon the principal case, and at first glance some of the dicta appear to conflict with Judge Turner's decision. Mr. Smith, *Mercantile Law*, 302, citing *Gurney v. Behrend*, 8 El. & Bl. 622, and *Gilbert v. Guignon*, L. R., 8 Ch. App. Cas. 16, says: "Several parts of a bill of lading signed by the master are generally delivered to the shipper; and in some instances the parts have been indorsed to different persons. In such cases, the first person to whom a part is regularly indorsed is entitled to the goods." And Mr. Benjamin, basing his remarks on a decision by the House of Lords, says: "The person who first gets one bill of lading out of the set of three (the usual number), gets the property which it represents, and needs do nothing further to assure his title, which is complete, and to which any subsequent dealings with the other bills of the set are subordinate; and that though the shipowner or wharfinger, if ignorant of the transfer of one bill of the set, may be excused for delivery to the holder of another bill of the set acquired subsequently, that fact will not affect the legal ownership of the goods as between the holders of the two bills of lading." *Benjamin on Sales*, § 1224; *Meyerstein v. Barber*, 4 Eng. & Ir. App. H. L. 817.

The questions to be considered are two:

1. Does the first transferee in good faith, without notice and for value, of any part of a bill of lading, take the goods of which it is a symbol, against all subsequent transferees? Thompson was a planter in Jamaica, heavily indebted to Caldwell & Co., in Liverpool, who were secured by mortgage of his estate. He was also heavily indebted to France & Co., in Liverpool. Thompson's agent in Liverpool was one Fairbrother. In March, 1785, Thompson shipped in the *Tyger*, owned by France & Co., and commanded by Ball, a large consignment of sugar and rum. He took three bills of lading from Ball. The first of these bills covered the whole cargo, and ordered delivery to Messrs. Thompson and Fairbrother or their assigns. While this bill was in Thompson's possession in Jamaica, the other two were drawn for different parts of the cargo, but together making up the whole cargo, and ordered delivery to the order of the shipper or his assigns, and were indorsed by Thompson as follows: "Deliver the within to Messrs. Thompson and Fairbrother, provided they engage to pay the net proceeds to Messrs. France and nephew, otherwise deliver them to the order of James France and nephew, on account of Coppell & Goldwin. The last-named persons were agents of France & Co., in Jamaica, and to them were delivered these two bills of lading, while Thompson still held possession of the first bill. Thompson then sent the first bill to Fairbrother, with a letter notifying him somewhat vaguely of having indorsed the other two bills to Coppell & Goldwin. Without communicating this notice to them, Fairbrother assigned the first bill to Caldwell & Co. In the meantime, Coppell & Goldwin forwarded their two bills to France & Co., and on arrival of the *Tyger* in Liverpool, both Caldwell & Co. and France & Co. demanded the goods of Ball, the master. He refused to deliver to Caldwell, who thereupon brought trover against Ball. It was held that both Caldwell & Co. and France & Co., being *bona fide* holders of the bills, for value and without notice, the goods were to be awarded to whoever had obtained first the legal title and possession, which was decided to be France & Co., the second and third bills having been given to their agents, Coppell & Goldwin, and the goods being in their vessel before the first bill was transferred to Caldwell. *Caldwell v. Ball*, 1 Term R. 205.

In this case it appears to have been the second and third parts, which, being first transferred, carried the title against a subsequent transferee of the first bill.

In *Meyerstein v. Barber*, L. R. 2 C. P. 88, A was indorsee of a bill of lading, drawn in a set of three, making cotton deliverable in London on payment of freight. The cotton had been lately landed, under an entry made by A at a sufferance wharf in the port of London, with a stop thereon for freight. On the 4th of March A obtained from M an advance of \$2500, on the deposit of two copies of the bill of lading, M assuming the third to be in the hands of the master. On the 6th of March, the stop for freight being then removed, A, who had in February instructed B, a broker, to take samples of the cotton and to offer it for sale, obtained from B an advance of \$2000, on the deposit of the third copy of the bill of lading, which A had fraudulently retained. On the 11th of March B, being informed of the prior advance by M, sent his copy of the bill of lading to the wharf and procured the cotton to be transferred in his own name, and afterwards sold it and received the proceeds. *Held*, that the bill of lading, when deposited with M, retained its full force and effect; that there was therefore a valid pledge of the cotton to M, and he could maintain an action against B, either for the proceeds of the sale as money received to his use, or for wrongful conversion of the cotton. *Meyerstein v. Barber*, L. R. 2 C. P. 88.

As intimated above, this case went on appeal to the House of Lords, wherein the judgment below was affirmed, and the lord chancellor (Lord Hatherly) said: "Now, if anything could be supposed to be settled in mercantile law, I apprehend it would be this, that when goods are at sea the parting with the bill of lading, be it one bill out of a set of three, or be it one bill alone, is parting with the ownership of the goods." *Barber v. Meyerstein*, L. R. 4 Eng. & Ir. App. (H. L.) 325. And Lord Westbury said: "It is unquestionable (as has been said here by one of the judges) that the handing over the bill of lading for any advance, under ordinary circumstances, as completely vests the property in the pledgee as if the goods had been put into his own warehouse. There can be no doubt, therefore, that the first person who, for value, gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must, in law, be subordinate to that first one; and for this reason, because the property is in the person who first gets a transfer of a bill of lading." *Barber v. Meyerstein*, L. R. 4 Eng. & Ir. App. (H. L.) 336. See, also, *Skilling v. Bollman*, 6 Mo. App. 76; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 191; *Railroad Co. v. Wagner*, 65 Ill. 198; *Vandover v. Wilmot*, 10 Ben. 223; *Zachrisson v. Ahman*, 2 Sandf. 68; *Gurney v. Behrend*, 3 El. & Bl. 622.

The form of the bill of lading does not appear in the *Caldwell Case*, *supra*, but in *Meyerstein's Case* it is shown that each part contained the usual clause, "one [part] of which being accomplished, the others to stand void." These cases certainly appear to sustain the position of the text-writers quoted above, that the transfer of any part of a bill of lading passes the property covered thereby. And perhaps a good reason for giving to the parts of a bill of lading all the force of originals is suggested by the supreme court of the United States in deciding that each part of a bill of exchange is an original. *Downes v. Church*, 18 Pet. 205; and see *Bank of Pittsburgh v. Neal*, 22 How. 96. As to the bank upon which they are drawn, each part of a bill of exchange is an original. The "second" or "third" will be paid without question upon presentation; the only inquiry by the bank being of its own book-keepers as to whether it has paid any other part besides that presented. This is not saying, however, that a person or bank, asked to discount a "second" or "third" bill drawn upon another person or bank, may safely discount the paper without inquiry as to its counterparts.

"On the other hand, great inconveniences might arise from compelling the plaintiff to produce the other parts of the set, or to account for their non-production, as he might not be able, satisfactorily, to prove that they had not been negotiated, or that they had been lost. In short, if the plaintiff, before he could recover, were required to produce or to account for all the parts of the set, he would be obliged, in every case where the bills had been transmitted by different conveyances abroad, to arm himself with proofs of every stage of their route and progress, until they should come back again into his hands, as preliminaries to his right to recover upon their being dishonored. Such a requirement would create most serious embarrassments in all commercial transactions of this sort; and instead of bills drawn in sets being a public convenience, they would be greatly obstructed in their negotiability, since the rights and the remedies of the holder might be materially impaired thereby." This argument seems to me to be just as forcible when applied to bills of lading drawn in sets as to sets of bills of exchange.

2. Is the case decided by Judge Turner distinguishable from those above given, so as to take it out of the rule established by the latter? There are two kinds of bills of lading commonly issued by railway carriers: one kind, a document containing the names of consignee and destination, describing the goods, and formulating the contract of carriage and delivery, together with the conditions made a part of it. This is the ordinary "inland" or "domestic" bill of lading, and is given in all ordinary shipments where a bill of lading is required. The other kind of bill is known as the "export" bill; a similar document in substance, but of somewhat greater formality and minuteness of provision. These "export" bills are given in cases of foreign "through" shipments, and they contain a clause common to the genuine maritime bill of lading, but omitted in the "inland" railway bill just mentioned, namely: "In witness whereof, the agent signing for the said transportation and steamship companies hath affirmed to— [number of bills inserted here] — bill— of lading, of this tenor and date, one of which being accomplished, the others to stand void."

This is the provision upon which rests the whole theory that each part of such a bill of lading is an original. The bill of lading contained such a clause as this in "*Meyerstein's Case*," above, and from the fact that the bills in the *Caldwell Case*, *supra*, were maritime bills, it may be fairly presumed that they contained a similar clause, although this does not appear in the report of the case. Now, the word "duplicate," written on the ordinary "inland" railway bill of lading, can hardly be fairly held to so plainly import originality like the broad, explicit clause in the maritime or "export" railway bill. Some decisions and dicta impute the force of an original to a duplicate. Thus Burrill says of duplicate: "That which is doubled or twice made; an original instrument repeated. A document which is the same as another in all essential particulars. *Tindal, C. J., 7 Man. & G. 93; Maule, J., Id. 94.* Sometimes defined to be the copy of a thing; but, though generally a copy, a duplicate differs from a mere copy in having all the validity of an original." Burrill, *Law Dict.* "Duplicate." So Abbott defines a duplicate as "a transcript of a writing equivalent to the original." *Abb. Law Dict.* "Duplicate"; citing *Benton v. Martin, 40 N. Y. 345.* See, also, *Bouv. Law Dict.* "Duplicate"; citing *Onsons v. Tyrer, 1 P. Wms. 346; Pemberton v. Pemberton, 13 Ves. 310; Roberts v. Round, 8 Hagg. Ecc. 548.* See *Lewis v. Roberts, 108 E. C. L. 29.*

But a well-established popular meaning of duplicate is, "that which exactly resembles or corresponds to something else; hence a copy, a transcript, a counterpart;" *Webst. Dict.* "Duplicate" (4to Ed.), 420. And it is in the sense of "copy" that it is, in my opinion, to be taken when written across an inland bill of lading. Whether it implies "originality" or merely a "copy," there are decisions which sanction Judge Turner's view that pru-



dence requires one buying or making advances on a "duplicate" bill to produce or account for the "original." Thus, upon application for probate of a "duplicate" will, both copies must, in England, be deposited with the registry of the court of probate. *Rapalje & L., Law Dict. "Duplicate;" Rawson, Pocket Law Lex.*

A case bearing upon the point is *Glyn, Mills, Currie & Co. v. East & West India Dock Co.* 5 Q. B. Div. 129. Goods having been shipped for London, consigned to C. & Co., the shipmaster signed a set of three bills of lading, marked "First," "Second," and "Third," respectively, making the goods deliverable "to C. & Co. or their assigns; freight payable in London; the one of the bills being accomplished, the remainder to stand void." During the voyage, C. & Co. indorsed the bill of lading marked "First" to the plaintiffs for a valuable consideration. Upon the arrival of the ship in London, C. & Co. entered the goods as consigned to them, and they were landed and placed in the custody of the defendants in their warehouses; the master lodging with the defendants notice, under the Merchants' Shipping act, 1862, to detain the cargo until the freight should be paid. C. & Co. then produced to, and lodged with, the defendants the second part of the set of bills of lading. The defendants accordingly entered C. & Co. in their books as enterers, importers, and proprietors of the goods, and the stop for the freight being afterwards removed, they delivered the goods to various persons, upon delivery orders, signed by C. & Co. *Held*, by Field, J., that the defendants were liable in an action by the plaintiffs for the value of the goods; for, without deciding whether the master could have been exonerated by a delivery of the goods to the person first presenting a bill of lading, the defendants were not, by receiving the goods, subject to the stop for freight, placed in the same position as the master and entitled to his rights; and, further, that in delivering the goods upon the order of C. & Co. they had acted in a character beyond that of mere warehousemen, and were guilty of conversion.

In deciding this case, Judge Field said: "If it is said to be a hardship on the defendants that they should be liable for delivery upon the production of the second part of the bill of lading, without any knowledge of a previous indorsement, it may be observed that they had the remedy in their own hands, as the part so produced was conspicuously marked 'Second,' and they had only to require the production of the 'First' part, which, as is well known, is usually sent to the consignee, and, in case of the non-production of it, to take an indemnity before delivery."

"Indeed, that is the course pursued by the defendants in their East India trade, in which the original bills of lading only are accepted, and, in case of loss, the defendants require satisfactory proof of title and an indemnity; thus showing that, in that trade, at least, precautions are taken which, if taken by the defendants in the present case, would have protected them against loss. If the law were held to be different from the result at which I have arrived, the consignee who had sold or dealt with goods to arrive would only have to avail himself of his almost necessary earlier knowledge of the arrival of the goods to anticipate, by production of his bill of lading, any production by the indorsee of the original, previously indorsed, and thus most seriously affect the transaction of any such dealings, which are effected solely in reliance upon the shipping documents." Per Field, J., in *Glyn, Mills, C. & Co. v. East India Dock Co.*, 5 Q. B. Div. 136. This appears to be substantially the same line of reasoning adopted by Judge Turner.

On the whole, the principal case appears well decided, because (1) if the bill of lading, as may be fairly presumed from the fact that the shipment was "inland," was an "inland" form, it is not within the rule applicable to maritime or "export" bills, the accomplishment of any part of which avoids all the others. (2) If the transfer of a mere duplicate bill of lading will pass the property, then the way is opened for the negotiation of every "dupli-

cate" issued, and the perpetration of gross frauds thereby. (3) To require a seller or pledgor of goods in inland transit to produce the "original" bill of lading or to account therefor, and show by other means a good title in himself to the goods, is not an onerous requirement, but one easily and quickly met. Ordinarily, the seller or pledgor can quickly procure the original bill of lading; if he cannot, and has yet a good title, he can give a bond of indemnity.

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LENTZ

v.

FLINT & PERE MARQUETTE R. R. Co.

(58 *Michigan Reports*, 444.)

A merchant, supposing that an insolvent customer to whom he had forwarded goods had received and appropriated them, made an affidavit as a creditor under the assignment. But the goods had not been received. *Held*, that the affidavit did not estop him from replevying them from the carrier.

Title by sale never passes absolutely and for all purposes on delivery without payment, except in sales on credit.

One who makes a cash sale subject to acceptance can replevy the goods from a common carrier, or from any one, unless it be a *bona fide* purchaser, so long as the buyer has neither accepted nor paid for them, or received them, or had the right to compel delivery. And if payment was due at once the mere acquisition of possession by himself or his assignee could not cut off the vendor's right.

An assignee of an insolvent cannot claim anything to which his assignor had no right, and is not by virtue of the assignment, a *bona fide* purchaser of goods which the insolvent could not rightfully have claimed.

ERROR to Osceola.

Replevin. Defendant brings error. Affirmed.

*Wm. S. Tennant* for appellant.

*Cooper & Winsor* for appellee.

CAMPBELL, J.—Lentz replevied from the defendant (being a carrier in possession) two sets of log-wheels and accompanying apparatus, which he had sent previously from Cadillac to Reed City, directed to one Wing, who had bargained verbally to purchase them. This bargain was made at Cadillac in May, 1883, and its terms were that plaintiff should get ready immediately one set of wheels which were in condition to be tired and ship them, with the chains, which he had to purchase, and to send on the second set as soon as he could. The first set was sent about May 12, and the second June 2, 1884, forwarded by the Grand Rapids & Indiana R. R. to Reed City. The articles were to be paid for as soon as shipped. After arriving at Reed City they remained there, and were never delivered to Wing or called for by him, and

he never communicated with Lentz. A clerk of his (who afterwards became his assignee), who testifies that he had charge of his correspondence, says that during Wing's absence he answered one of Lentz's letters of advice by promising that a draft should be sent immediately on Wing's return. He did not identify the particular time very clearly, but as far as he did it seems to have been the second shipment. Lentz denies receiving any letter except one on the second shipment, and no draft or payment was forwarded for either. Lentz says the purport of the letter was merely that the clerk would remind Wing. There was no testimony that this clerk, Dermont, had any authority beyond corresponding, and no pretence of payment in any shape.

On the 3d of July, Wing made a general assignment to Dermont. The only log-wheels which he described specifically were set out as being about his mill premises, and they are put in at a much lower value than those now in suit. Wing was at this time hopelessly insolvent, having debts exceeding \$188,000, and assets less than \$4000.

The assignee swears that about the end of July he went to Reed City and into the office of the Grand Rapids & Indiana R. R., and told them they had two sets of wheels on which he wanted to pay freight, and paid them eight dollars which they said was the amount due, and took a receipt, which was not produced on the trial. This payment was actually only on one of the shipments not identified. He says that he had the wheels delivered to defendant for shipment to Wingleton. They were not so forwarded, and Lentz found them on the 3d of August, replevied them, and paid the freight both for the original shipments and for the return.

On the trial the court below made the case to turn on whether the property had been accepted by Wing, and the jury found it had not. Some stress was laid by defendant's counsel (who represent the interest of the assignee, the defendant being indifferent) on an affidavit filed by Lentz as a creditor under the assignment. But this was claimed to have been made under the mistaken belief that the property had been appropriated by Wing, and it could not work an estoppel.

We think the charge was quite as favorable to defendant as could be justified. We have discovered no evidence which showed any acceptance at all, and there was never any delivery to Wing himself, nor any right in him to compel delivery when he made the assignment. The sale was a cash sale, and we do not think there is any testimony which would justify a conclusion that title was to pass before payment. Neither would he have been bound to accept the articles, which he had never seen, without an opportunity to inspect them. Wing never saw them, and never had any personal communication either with Lentz or with the carrier. He did not own the property

NO TITLE PASSES  
WITHOUT PAY-  
MENT ON A CASH  
SALE.

when he made the assignment, and Lentz never made any contract with the assignee. Assuming that the case lies outside of the statute of frauds, the assignee was not a *bona fide* purchaser, and could not claim them if Wing could not. Payment being due at once, the mere acquisition of possession could not be relied on by Wing, if he had obtained it, to cut off Lentz's rights. It is only in sales on credit that title passes absolutely and for all purposes on delivery without payment. 2 Kent's Com. 497, and cases.

While we are inclined to think that the sale was such as to be within the statute of frauds, so that there never was any binding contract whatever, yet this is not important on the present record, for it is very clear that without acceptance or payment by Wing, Lentz could not lose his right to resume possession, as against any one but a *bona fide* purchaser. We need not consider how far such a purchaser could maintain a right in articles not sold on credit and not paid over. *Shipman v. Gravea*, 41 Mich. 675.

The judgment must be affirmed.

The other justices concurred.

**Stoppage in Transit; Replevin; Waiver.**—Stoppage in transit is the right of a vendor of goods upon credit to reclaim and take possession of them while they are being carried to the vendee, whose bankruptcy or insolvency has occurred or become known after the sale. Numerous remedies exist for the enforcement of this right, in case of a demand for the goods and a refusal to deliver them. Trover lies. *Morrison v. Gray*, 2 Bing. 260; *Bohtlingk v. Inglis*, 3 East, 381; *Inslee v. Lane*, 57 N. H. 454, as does also trespass on the case. *Calahan v. Babcock*, 21 Ohio St. 281; *Pottinger v. Hecksher*, 2 Grant Cas. 309, and replevin, the remedy used in the principal case. *Benedict v. Schaettle*, 12 Ohio St. 515. In this case the vendor of goods on a credit, having shipped them, discovered that the vendee was insolvent, and replevied the goods from a constable who had taken them under an order of attachment, as the property of the vendee while on their transit. *Held*, that the vendor had a right to stop the goods *in transitu*. And it is not necessary that the charge or lien of the carriers for freight be paid before the writ of replevin is issued; it is sufficient if it be paid before the goods are taken from their possession. *Hay v. Mouille & Co.*, 14 Pa. St. 48.

The right of stoppage in transit may be waived by the vendor, as, for example, where the latter knows of the vendee's insolvency at the time of the sale. *Buckly v. Furniss*, 15 Wend. 137; *Conyers v. Ennis*, 2 Mason, 236; *O'Brien v. Norris*, 16 Md. 122; where cotton is nominally sold for cash, but the price is not paid on delivery, and the vendor receives on the following day a part of the price, and accepts security for the balance, the right to stop is waived. *Mason v. Elliott*, 30 La. An. (Pt. 1) 147.

And, generally, where goods are purchased and paid for by the order, note, or accepted bill of a third party, without the indorsement or guaranty of the purchaser, the vendor has no right to stop. *Eaton v. Cook*, 82 Vt. 58. But the commencement of an action against the vendee by the attorney of the vendor for the price of the goods sold on credit, without the vendor's knowledge, and before either was apprised that the transit was not ended, is not a waiver of the right to stop, if it asserted within a reasonable time, and the improvident action be discontinued. *Calahan v. Babcock*, 21 Ohio St. 281. An attachment of the goods by the vendor while they are in transit waives

his right to stop them. *Woodruff v. Noyes*, 15 Conn. 385. But an attachment of the goods in transit by a creditor of the vendee will not defeat the right. *Clark v. Sheriff*, 4 Daly, 88; *Buckley v. Furniss*, 15 Wend. 187; *Benedict v. Schaettle*, 12 Ohio St. 515; *Wood v. Yeatman*, 15 B. Mon. 270; *Woodruff v. Noyes*, 15 Conn. 385; *O'Brien v. Norris*, 16 Md. 122; *Hays v. Mouille*, 14 Pa. St. 48; *Blackman v. Pierce*, 23 Cal. 508; *Aguirre v. Parmalee*, 22 Conn. 473; *Blum v. Marks*, 21 La. Ann. 268; *Calahan v. Babcock*, 21 Ohio St. 281; *Rucker v. Donavin*, 13 Kan. 251; *Morris v. Shryock*, 50 Miss. 590; *Seymour v. Newton*, 105 Mass. 272; *Smith v. Goss*, 1 Camp. 282.

Neither will a sale of goods attached by order of court defeat the right. The effect of such sale is merely to convert the goods into money, which remains in the hands of the sheriff, pending the determination of the attachment, and subject to any claims that might have been asserted against the goods themselves. *O'Brien v. Norris*, 16 Md. 122.

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### DORBIN

v.

### MICHIGAN CENTRAL R. Co.

(*Advance Case, Michigan. April 29, 1885.*)

D. shipped by rail, from Williams station to Kalamazoo, a lot of bricks consigned to W. R., who refused to receive them. D., on being informed of this, went to Kalamazoo, where the agent of the railroad company told him he had an order from W. R. to let C. have the brick, and D. told him that was all right. The order was as follows: "M. C. R. R.,—I have no claim on them brick you have at the station from Williams station. You can let C. have them. W. R." The order was not shown to D., but the bricks were delivered to C. D. demanded pay from W. R., which was refused, and he brought an action against the company for delivering the bricks to the wrong person. *Held*, that the railroad company was not liable.

#### ERROR to Kalamazoo.

*Wm. A. Luby* for plaintiff and appellant.

*Edwards & Stewart* for defendant.

CHAPLIN, J.—On June 25 and 26, 1884, plaintiff consigned to William Ritchie, at Kalamazoo, Michigan, three car-<sup>FACTS.</sup> loads of bricks from Williams station, on the line of defendant's road. Ritchie was notified of the consignment and refused to take the bricks, whereupon the agent at the shipping station was informed thereof, and requested to furnish instruction for the disposition of the bricks as soon as possible. The agent indorsed on the letter as follows: "Mr. Dobbin, please give information on the above to me,"—and forwarded it to Mr. Dobbin. The next day, after he had received this letter, Mr. Dobbin came to Kalamazoo, and went to the railroad freight office and saw Mr. Fulford, the defendant's agent, who told him that he had an order from Mr.

Ritchie to let Mr. Doyle have the bricks, and plaintiff told him that was all right. The order was not shown to him at this time. It was as follows:

"KALAMAZOO, July 2, 1884.

"M. C. R. R.,—I have no claim on them brick you have at the station from Williams crossing. You can let Mr. Doyle have them.

"W. RITCHIE."

On receiving this order defendant turned the bricks over to Mr. Doyle. Later, plaintiff demanded pay for these bricks of the consignee. He refused to pay, and thereupon plaintiff brought this suit to recover the value of the bricks from the defendant, for delivering them to the wrong person.

The circuit judge charged the jury that upon the foregoing facts, as matter of law, the company performed its duty upon the delivery of the bricks to Doyle upon the order of Ritchie, and that the plaintiff was not entitled to recover. The plaintiff insists that this charge is erroneous; that the order did not justify the delivery of the bricks to Doyle, because on its face it repudiated all claim to them. But the order on its face was sufficient authority for the company to deliver the bricks to Doyle. The statement that he had no claim upon them was not a refusal to receive them, and the direction to let Doyle have them was a sufficient acceptance of them by the consignee to justify the delivery to Doyle. But, further than that, the plaintiff ratified the act upon being informed of the facts, and cannot now recede and claim a wrong delivery.

There is no error in the record, and the judgment is affirmed.

The other justices concurred.

**Orders for Delivery.**—The defendants, who were common carriers, had a written order from the plaintiff "to deliver to F. or Dane County Bank any packages that might come for him." They received at their express office, which was in the same building with the bank, a package of \$1000 for the plaintiff, and the bank clerk being in while defendants were distributing their goods, they said to him: "Here is a package for D. J. B." (the plaintiff); "will you take it?" He answered, "I will ask the bank," and, returning immediately, said, "Let F. have it." The defendants' agent left word at the store of F. that the package was at the office; F.'s clerk said that F. was absent, but that he would come over and see about it. He afterward went over and said that "F. was away and had the key of the safe, and that the defendants would have to keep it." The package was not offered to him, nor was it entered on the delivery book, according to the custom of the company. *Held*, that the package was not delivered, and that the company was liable. *Baldwin v. American, etc., Co.*, 23 Ill. 197.

"Delivered at the depot at Whitewater free" was held to mean that the consignees were not to be at any expense for packing and hauling the goods to the depot. *Congar v. Galena C. U. R. Co.*, 17 Wis. 477.

A statement by a teamster that certain flour owned by his employer was for a third person does not authorize delivery of the flour to such person. *Sawyer v. Chicago & N. W. R. Co.*, 22 Wis. 403.

Where a railway company issued two delivery orders for the same grain, both orders being in the same form, and containing nothing to show that they related to the same consignment, it was held liable to third persons making advances upon both orders. *Coventry v. Great East. R. Co.*, L. R. 11 Q. B. Div. 776.

Where goods are sent "order A. B. & Co., notify C.," if the company delivers to C. without an order from A. B. & Co. it is liable for a mis-delivery. *Wright v. North. Cent. R. Co.*, 8 Phila. 19.

Where an order was given to a firm of warehousemen authorizing them to receive from a railway company all goods shipped to the drawer, after which the firm was dissolved, and a new firm composed of a part of the members of the old firm was formed, *held*, that the new firm derived no authority from the order to receive the goods of the drawer. *Angell & Co. v. Mississippi & Missouri R. R. Co.*, 9 Iowa, 487.

The owners of a lot of flour which had been brought to B. by a railroad company, and which remained at the railroad depot, sold fifty barrels thereof and gave to the purchasers an order upon the company for the delivery thereof, and the purchasers upon presenting the same received another order, or "flour check," for the same, which, according to the usual course of business, was delivered to a clerk who had charge of the actual delivery of flour from the depot, and who was accustomed to keep such "flour checks," and take receipts upon the back thereof for flour actually delivered. This clerk delivered twenty-two barrels of flour to the purchasers, and twenty-eight barrels to other persons not authorized to receive them. *Held*, that the company was liable to the purchasers for the value of the twenty-eight barrels without regard to the question of its due care or negligence. *Hall v. Boston & Worcester R. R. Co.*, 14 Allen (Mass.), 439.

## ROSENFELD

v.

PEORIA, D. AND E. RY. CO.

(*Advance Case, Indiana. September 24, 1885.*)

Common carriers may limit their liability as insurers, but cannot relieve themselves from liability for negligence or fraud to a specified sum.

But if a shipper, for the purpose of getting a reduced rate on his goods, misrepresents their value to the carrier, this is a fraud which will preclude his recovery for their loss at a greater valuation.

If a carrier claims that by contract or the misconduct of a shipper, his common-law liability has been limited, the burden is upon him clearly to show it, and all such contracts will be interpreted most strictly against the carrier.

A bill of lading stipulated that in case of loss the value or cost at the point of shipment should measure the amount of recovery. In the bill were also the letters and figures "L. & O. Ex. \$20. R. R. Val." These letters and figures were placed there without the shipper's knowledge, were illegibly written, and their meaning, "Leak and outs excepted, \$20 railroad valuation," was unknown to him. *Held*, that he was entitled to recover the value of the goods at the point of their shipment.

APPEAL from Vanderburg circuit court.

*C. L. Wedding* for appellant.

*Denby & Kumler* for appellee.

**ZOLLARS, J.**—Appellant delivered to appellee a barrel of whiskey FACTS. to be transported and delivered to James O'Brien at Litchfield, Illinois. It was never delivered, and appellant brought this action to recover its value. When it was delivered to appellee, appellant received from its agents a bill of lading. In that there is a statement of the name and residence of the consignee, and a description of the article as "1 bbl. whiskey, of 400 pounds weight." Following the statement there is a blank, followed by printed stipulations, one of which reads thus: "In the event or loss of damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same." In the blank there are letters and figures which witnesses say are "L. & O. Ex. \$20. R. R. Val.," but they are so run together and illegible that it would be impossible for any one not knowing for what they were intended to decipher them all. The interpretation of these characters, as given by the agents of the railway company, is, "Leaks and outs excepted, \$20 railroad valuation." The contention in behalf of the railway company is that because of those characters in the bill of lading appellant is limited in his recovery to \$20, and the interest on that amount from the time the whiskey should have been delivered. The court below adopted this theory, rendered judgment for appellant for \$21.40, although the barrel of whiskey was shown to have been worth \$96. On the other hand, appellant contends that the printed stipulations as to the amount of recovery should control, and that if the characters in the blank space, with the interpretation given them by witness, should be regarded as a part of the contract, it would be such a contract as the court should not uphold. Thus we have questions presented by the argument of counsel—First, can a railway company make and enforce a contract limiting the amount against it for the loss of articles received by it for transportation as a common carrier? Second, do the characters in the blank in any way have the force and effect of a contract binding upon appellant? These in their order.

It is the settled law of this State, abundantly supported by authority and reason, that while common carriers may by contract limit their liability as insurers, they cannot by contract relieve themselves from the consequences of their own negligence or fraud. The law will not allow a common carrier to contract to be safely negligent or dishonest. *Michigan Southern & N. I. R. Co. v. Heaton*, 37 Ind. 448; *Ohio & M. Ry. Co. v. Selby*, 47 Ind. 471; *St. Louis & S. E. Ry. Co. v. Smuck*, 49 Ind. 302; *Adams Exp. Co. v. Fendrick*, 38 Ind. 150; *Indianapolis, P. & C. R. Co.*

RULE AS TO LI-  
MITING LIABILI-  
TY.



*v. Allen*, 31 Ind. 394. See *Lawson, Carr.* § 31 *et seq.*, and the numerous cases there cited.

In the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, after holding that common carriers cannot contract against their liability for negligence, the court reached the following conclusions: (1) That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; (2) that it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." Under these rules, and the elaborate reasoning upon which they are based, may common carriers arbitrarily, or by contract, place a value upon articles received for carriage, and in this way limit the amount of recovery against them in case of loss? If they may contract against all liability for loss by means other than their own negligence or fraud, of course they may contract for the amount of recovery in such cases. But in case of a loss through their negligence or fraud, the same reasons at first view would seem to exist against contracts limiting the amount of recovery as exist against contracts for total exemption. And hence some of the courts have held such contracts invalid. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645; s. c., 2 Pac. Rep. 821; *U. S. Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.*, 55 Wis. 319; s. c., 13 N. W. Rep. 244; *Moulton v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 85; s. c., 12 Am. & Eng. R. R. Cas. 13.

If, without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract, and a valuable consideration, the carrier should place a value upon the articles received for carriage, that would not bind the shipper. In such case he would clearly have the right to recover the full value of the articles lost by the carrier. If, on the other hand, for the purpose of getting reduced rates, the shipper should place a value upon the article for carriage, or if by any kind of artifice he should induce the carrier to place a lower value upon the articles, and thus get reduced rates, it seems to be settled by the weight of authority that he could not recover beyond the value so fixed by him, or the value which, by deceit, he caused the carrier to fix. To hold otherwise would be to enable the shipper to take advantage of his own wrong. Carriers have the right to fix their charges according to the value of the article to be carried. The greater the value, the greater the responsibility and liability in case of loss. For assuming these, the carrier is entitled to charge increased compensation. *Lawson, Carr.* 88, 89, and cases there cited. If the shipper may, by false statements or artifice, deceive the carrier as to value, and thus get lower rates, and still recover from the carrier the full value, he is enabled to consummate a wrong upon the

MISREPRESENTATION OF VALUE BY SHIPPER.

carrier which should not be sustained by the courts. *Graves v. Lake Shore & M. S. R. Co.*, 137 Mass. 33; s. c., 16 Am. & Eng. R. R. Cas. 108; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604. To hold the carrier liable in such a case for the full value of the article, beyond the representations of the shipper, would seem to be neither just nor reasonable, and if neither just nor honorable, such a holding is not demanded by any considerations of public policy. This limitative liability is not regarded as in conflict with the general rule that common carriers cannot, by contract, limit their liability for loss occurring through their negligence, but as an exception to it. 2 Greenl. Ev. § 215; *Lawson, Carr.* 87, and cases there cited; *Story, Bailm.*, §§ 565-567; *Cole v. Goodwin*, 19 Wend. 251.

Another rule of the law that seems to be settled by the weight of authority is that if the carrier claims that, by contract or the misconduct of the shipper, his common-law liability has been limited, the burden is upon him to clearly show it, and that all such contracts will be interpreted most strictly against the carrier. In the case of *St. Louis, etc., Ry. Co. v. Smuck*, 49 Ind. 302, this court said: "But, in our opinion, contracts not clear in their meaning, by which common carriers seek to avoid the responsibility which the law imposes upon them, should be construed most strongly against them." *Indianapolis & Cen. R. Co. v. Cox*, 29 Ind. 360; *Lawson, Carr.* §§ 135-246, and cases there cited. And so, too, that carriers may, by fixing value, limit their common-law liability, it must be shown that the shipper had some kind of knowledge of such fixing of value, and for a sufficient consideration consented thereto, or that his statements or conduct justified the carrier in so fixing the value, as we have before stated.

Tested by these rules of the law, how stands the case before us? As we have seen, there is an express and definite stipulation in the bill of lading that in case of loss the value or cost at the point of shipment shall measure the amount of recovery. To overthrow this specific stipulation, appellee relies upon the figures and letters in the blank, which, as we have seen, are so written that no one could read or interpret them, unless he had previous knowledge of their import. We think that it would not be reasonable to hold that these shall overthrow the express and plainly printed stipulations above referred to, and that the only proper and reasonable construction of the contract is that it fixes the amount of recovery, in case of loss, at the value of the barrel of whiskey at the point of shipment.

The evidence shows that the agents of appellee put the letters and figures upon the bill of lading without the knowledge or consent of appellant. He had no understanding, or knowledge of their import, except what they of themselves import, and that was

CONSTRUCTION  
OF LIMITATION  
OF CONTRACTS.

UNINTELLIGIBLE  
LETTERS AND FIG-  
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ATION OF VALUE.

practically nothing. He made no representations as to the value of the barrel of whiskey, nor was he asked to make any. The testimony by the agents of appellee tends to show that less freight was charged than would have been charged had the value been stated at a greater amount; but there is no evidence that appellant was a party to such an arrangement, nor that he had any knowledge of it. There is evidence that he had accepted several like bills of lading for barrels of whiskey shipped, but they of themselves would not furnish any information that the carrier, by such letters and figures, was limiting its liability—first, because the letters and figures could not be intelligently deciphered by the shipper; and, second, if they could, they would not be sufficient to overthrow and destroy the plainly printed stipulation that the damages should be measured by the value at the point of shipment.

We do not regard this as a case to be settled upon a conflict of the evidence, but as a case where there is no evidence at all to bind the shipper to the value as so fixed by the carrier. For these reasons, we think that the judgment should be reversed. Other questions are discussed by counsel, but it does not seem necessary that we shall now decide them.

The judgment is reversed, with costs, with instructions to the court below to sustain appellant's motion for a new trial, and proceed in accordance with this opinion.

**Limitation of Liability to a Specified Sum : Valid.**—Many cases present rulings upon this subject. A special contract that the value at the time and place of shipment, not to exceed fifty dollars per head, should be the measure of recovery has been held reasonable, and the measure of the carrier's liability. *The S. & N. Ala. Ry. Co. v. Henlein*, 52 Ala. 606. A stipulation that the measure of recovery for horses should be two hundred dollars per head was held binding, although one of the horses killed was worth fifteen thousand dollars. *Hart v. Penn. R. R. Co.*, 7 Fed. Repr. 630. In England by statute damages for injury to a horse are limited to £50, unless at the time of delivery a greater value is declared. *Hodgman v. W. M. Ry. Co.*, 83 L. J. (Q. B.) 238; See also *McCance v. L. & N. W. Ry. Co.*, 7 H. & N. 477; and in *Hill v. L. & N. W. Ry. Co.*, 42 L. T. 513, a ram was negligently injured. No declaration of value was made at the time of shipment, and it was decided that the liability was limited to the amount specified in the Railway and Canal Traffic Act. In Massachusetts, the Supreme Court says: "The stipulation that they (a railway company) should not under any circumstances be held liable beyond the sum of \$200 for injury to or less of any single animal was a proper and lawful mode of securing a due proportion between the amount for which they might be responsible and the freight which they received, and of protecting themselves against extravagant and fanciful valuations. *Squire v. New York Central R. R. Co.*, 98 Mass. 245, citing *Clay v. Willan*, 1 H. Bl. 297; *Harrison v. London B. & S. C. R. Co.*, 2 B. & S. 122; *Orange County Bank v. Brown*, 9 Wend. 86. In *Newburgher v. Howard, etc., Ex. Co.*, 6 Phila. 174, the express receipt was as follows: "The holder shall not demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured and so specified in the receipt." No insurance was made and nothing to vary the effect of this clause was shown. It was held that the carriers were liable only to the amount of fifty dollars.

In New York the rule appears well settled that where a carrier by his contract, limits his liability to a specified amount in case the value of goods delivered for carriage is not stated by the shipper, if goods of greater value are so delivered, silence on the part of the shipper as to the real value although there is no inquiry by the carrier, and no artifice to conceal the value or to deceive, is a legal fraud, which discharges the carrier from liability for ordinary negligence for an amount exceeding the limitation of the contract. *Magnin v. Dinsmore*, 70 N. Y. 411. See also *s. c.*, 56 N. Y. 168; 62 N. Y. 85; *Belger v. Dinsmore*, 51 N. Y. 166.

A similar ruling was made in *Earnest v. Express Co.*, 1 Woods, 573, wherein it was held that common carriers have a right to demand good faith and fair dealing from those whom they serve. So where, by notice brought home to a shipper, an express company made known that it would not be liable to a greater amount than fifty dollars for the loss of unvalued packages, and the shipper, to avoid paying the regular charges of the company, failed to disclose the value of a package delivered for carriage, and led the company to treat it as of small value, whereby it was lost, it was held that the shipper could only recover fifty dollars, although the package was of much greater value, and although the company, had the value of the package been made known to it, might have been considered guilty of negligence.

In a similar case in Illinois, *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62, such a limitation of liability was sustained, and it was pointed out that a distinction exists between the effects of those notices by a carrier by which it is sought to discharge him from duties which the law has annexed to his employment and those designed simply to insure good faith and fair dealing on the part of his employer. In the former, notice without assent to the attempted restriction is ineffectual, while, in the latter, actual notice alone will be sufficient. See also *Orange Co. Bank v. Brown*, 9 Wend. 86; 2 Greenl. Ev., Sec. 215; *Ang. on Carriers*, sec. 245; *Farmers and M. Bank v. Champlain Trans. Co.*, 23 Vt. 186; *Moses v. Boston & M. R. R.*, 4 Foster, N. H., 85; *Western Trans. Co. v. Newhall et al.*, 24 Ill. 466.

M. delivered to an express company for transportation a trunk with contents of the value of \$4172, taking a receipt exempting the company from loss by fire and from liability beyond \$50, "at which sum said property is hereby valued, unless the just and true value thereof is stated herein." The value of the trunk and contents was not stated in the receipt. Through the negligence of the employees of a railroad company employed by the express company to transport the property, it was destroyed by fire. In a suit by M. against the express company for the value of the property. *Held*, that the limitation of the liability to \$50 is binding on M., as a reasonable condition. *Muser et al. v. Holland, Treas. Am. Ex. Co.*, 17 Blatchford, 412.

In *Elkins v. Empire Transportation Co.*, 81\* Pa. St. 315, by a bill of lading of a transportation company, loss occurring during the transportation was to be "computed at the value of the cost of the goods at the time and place of shipment." A tariff of rates of freight put "high wines" in the first class, and in the fourth class "high wines" . . . "at an agreed valuation, not exceeding \$20 per barrel;" the freight for first class was \$1.60, for fourth class 50 cents per 100 pounds, the rate of freight written in the bill was "50 cents per 100 pounds;" and "valuation \$20 per barrel." *Held*, that this valuation and rate were controlling parts of the bill, and loss occurring to the goods was to be estimated at \$20 per barrel.

In *Hart v. Penn. R. Co.*, 5 Sup. Ct. Repr. 151; 7 Fed. Repr. 680, the Supreme Court of the United States laid down the following rule: Where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent

of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible, and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

This rule was applied in the following case: H. shipped five horses, and other property by a railroad in one car under a bill of lading signed by him, which stated that the horses were to be transported, "upon the following terms and conditions, which are admitted and accepted by me as just and reasonable. First, to pay freight thereon" at a specified rate, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. . . . If a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load. But no carrier shall be liable for the acts of the animals themselves, . . . nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." By the negligence of the railroad company or its servants, one of the horses was killed and the others injured, and the other property was lost. In a suit to recover the damages, it appeared that the horses were race-horses, and the plaintiff offered to show damages, based upon their value, amounting to over \$25,000. The testimony was excluded, and he had a verdict for \$1200. On a writ of error, brought by him, *held*, (1) the evidence was not admissible, and the valuation and limitation of liability in the bill of lading were just and reasonable, and binding on the plaintiff; (2) the terms of the limitation covered a loss through negligence.

The court said: "The subject-matter of a contract may be valued or the damages in case of a breach may be liquidated in advance. In the present case the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation. The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in *Squire v. N. Y. Central R. Co.*, 98 Mass. 239; *Hopkins v. Westcott*, 6 Blatchf. 64; *Belgier v. Dinsmore*, 51 N. Y. 166; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62; *Magnin v. Dinsmore*, 56 N. Y. 168, and 62 N. Y. 35, and 70 N. Y. 410; *Earnest v. Ex. Co.*, 1 Woods, 573; *Elkins v. Empire Trans. Co.*, 81\* Pa. St. 315; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606; *Same v. Same*, 56 Ala. 368; *Muser v. Holland*, 17 Blatchf. 412; *Harvey v. Terre Haute R. Co.*, 6 Am. & Eng. R. R. Cas. 293; and *Graves v. Lake Shore R. Co.*, 137 Mass. 33. The contrary rule is sustained in *Southern Ex. Co. v. Moon*, 39 Miss. 622; *City of Norwich*, 4 Ben. 271; *U. S. Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Trans. Co.*, 55 Wis. 819; *Chicago, St. Louis & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Kansas City R. Co. v. Simpson*, 30 Kan. 645; s. c., 16 Am. & Eng. R. R. Cas. 158; and *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85; s. c., 12 Am. & Eng. R. R. Cas. 13. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions."

**Same: Not Valid.**—In *McCune v. B. C. R. & N. R. Co.*, 52 Iowa, 600, a regulation of a railway company to the effect that no valuable live-stock shall be received for shipment until a contract is signed by the owner releasing the company from all liability for injury to such stock in shipment, above the value of ordinary stock, is void under section 1308 of the Iowa Code.

In Minnesota, by the terms of a contract for the transportation of a car-load of horses, the railway company was discharged from any liability for any

cause, excepting the wilful negligence of its agents. By other terms of the contract it was agreed that in case of total loss the damage should in no case exceed the sum of \$100 per head. The contract was construed as, in effect, an agreement for absolute exemption from liability except for wilful negligence; and in case such contract of exemption should not be sustained, then that the liability should be limited to the sum named. *Held*, not valid as exempting the railway company in whole or in part from liability for its own negligence, to the extent of the value of the property. *Moulton v. St. Paul M. & M. R. Co.*, 31 Minn. 86; s. c., 12 Am. & Eng. R. R. Cas. 13.

In Kansas where a horse was shipped by rail, and the bill of lading was signed by the carrier and by the agent of the shipper, and provided that "value not to exceed \$100," which was arbitrarily inserted in the bill of lading by the carrier, and the horse was injured by the carrier's negligence, it was held that the recovery was not limited to \$100. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kans. 645; s. c., 16 Am. & Eng. R. R. Cas. 158.

In Wisconsin it was held that the words "liquor carried at val. \$20 per bbl." stamped upon the face of a receipt, if they can be construed into a contract to limit the liability of the carrier to the sum of \$20 in case of loss, must be so construed as to limit such liability only in case of loss without the fault of the carrier. *Black v. Goodrich Trans. Co.*, 55 Wis. 319.

## PEORIA AND PEKIN UNION R. R. Co.

v.

BUCKLEY *et al.*

(*Advance Case, Illinois. June 13, 1885.*)

A worthless check is not a payment for goods sold.

When grain is received by car in Peoria, it is the custom of the Board of Trade at that place to inspect it and to make two inspection tickets, one of which is put on the car and the other delivered to the owner. Plaintiff received and had inspected a car-load of oats, and subsequently ordered them delivered by the railway company to its elevator, which was done. Plaintiff then sold the oats to P, and delivered to him the inspection ticket with the price of sale marked on it and the letter "A" to indicate the elevator where the grain was stored. P gave plaintiff a check to pay for the oats, and, presenting the inspection ticket at the elevator, directed them to be shipped, which was done, the elevator (railway) company inferring from P's possession of the inspection ticket that P was owner of the grain. *Held*, that possession of the inspection ticket was no evidence of ownership or authority to receive the grain, and, P's check proving worthless, that the railway company were liable for the oats.

APPEAL from Second District.

*Stevens, Lee & Horton* for appellant, Peoria & P. U. Ry. Co.

*Puterbaugh & Puterbaugh* for appellees, Warren R. Buckley and others.

SOOT, J.—On the trial of this case defendant submitted numerous propositions to be held as law applicable to the case, most of

which were refused, and on that decision of the court the questions of law discussed arise.

In order to determine whether the rulings of the court on the propositions submitted were erroneous or not, it will be necessary to ascertain the principal facts; and in doing so it will be understood that all the facts the evidence tends to establish were found by the trial and appellate courts in favor of plaintiffs. It appears that defendant is warehouseman, and has an elevator on its line of railroad, situated in the city of Peoria, and known as "Elevator A." On the 26th day of October, 1883, plaintiffs, who were grain dealers at Peoria, received a car, No. 12,977, consigned to them, containing oats, and on the next day they received car FACTS. No. 2397, also containing oats. It is proven it was the usual custom, and one most generally observed by dealers on the Board of Trade in Peoria, when grain is consigned to a dealer, and the cars stand on the track, to cause it to be sampled by a person appointed by the Board of Trade for that purpose. The sampler gives a ticket stating the kind and grade of grain inspected and the consignees named, and posts one of these tickets in the car, and gives the other to the consignee, with a sample of the grain. That was done in this case. There is evidence tending to show it was the custom among dealers on the Board of Trade, as plaintiffs were, when a sale is made on the Board, for the seller to mark on these tickets the name of the person to whom the grain may be sold, and the price at which it is sold, and give the same to the purchaser, with an order, either verbal or written, to deliver the grain sold at such place as the buyer may designate.

In this case the grain in controversy was sold by plaintiffs on the Board of Trade to a fellow-member of that Board by the name of Patterson. The inspection tickets were delivered to Patterson at the time plaintiff sold him the oats. On the tickets plaintiff wrote the price in figures at which the oats were sold, and marked thereon the letter "A," which indicated the elevator at which Patterson wished to have the oats delivered or sent. The oats were sent to defendant's elevator by directions of plaintiffs, and were there unloaded. As respects these facts there seems to be no disagreement between the parties. The oats were sold to Patterson, and his check taken for the amount to be paid. On presentation to the bank on the next morning after it was drawn, the check was not paid, as the drawer had no money in the bank. In the mean time the oats had been shipped away by the order and on account of Patterson, by defendant, under the directions of Patterson, and the question made is whether defendant had any rightful authority to ship the oats on the order of Patterson.

Plaintiffs admit they directed the railroad company to deliver the oats at the elevator of defendant; but they deny most positively they ever gave defendant any authority, either verbal or written,

to deliver the oats, or any part of them, to Patterson. The only proof made by defendant, as respects any order from plaintiff to deliver the oats to Patterson, was the presentation of the inspection tickets by Patterson, with the price marked thereon, and the letter "A," which indicated the oats were to be delivered at defendant's elevator for the consignee; but the tickets, although in the hands of Patterson, contain no order to defendant to deliver the oats to him. The tickets were delivered to Patterson, as was the usual custom on the board of trade, as evidence of the price at which the grain was sold to him, and nothing more. It was to be a cash sale, and plaintiffs were under no obligation to direct defendant to deliver the oats to Patterson until the same were paid for. The giving of a check is no actual payment unless it is afterwards paid. In this case, the check given by Patterson, as has been seen, was not paid, and on learning that fact plaintiffs immediately demanded the oats of defendant, and which they did not and could not deliver, for the reason they had before that time shipped the oats on the order of Patterson.

It was a controverted question of fact at the trial whether defendant had any authority, verbal or written, from plaintiff to deliver the oats to Patterson, and as it must have been found against defendant in the lower court, which have the exclusive authority by law to determine such question, it is not open for investigation in this court. On the hypothesis defendant had no prior authority from plaintiffs to deliver the grain to Patterson, the law is that they are responsible for it to plaintiffs.

The court, at the instance of defendant, held the law to be "that if Buckley & Co. clothed Patterson with evidence of the ownership of the grain in controversy, or held him out as the owner of it, or allowed him to appear as the owner of the grain, with full power of disposition, and the elevator company was innocently led into dealing with him on the strength of his apparent ownership or authority, it will be protected in so doing, and Buckley & Co. cannot now recover of said elevator company the value of said grain." Evidently the court found the facts did not bring the case within the operation of the principle embodied in this proposition, which states the law quite as favorably for defendant as it could ask to have it expressed.

The propositions refused contain little more than the one held to be law, although expressed in somewhat different language. In view of the fact, the court must have found defendant had no sufficient authority to deliver the grain it had received as the property of plaintiffs to Patterson.

There was certainly no error in law in refusing to hold as the court was asked to do in the several other propositions admitted. Unless defendant had permission from plaintiffs, expressed in some form, either verbal or written, or implied by their acts, or were

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estopped by some act or acts done, to deny that such permission was given for the shipping of the grain by the direction of Patterson, and, on his account, was clearly wrongful, and the law would require the warehouseman to account for it to the consignee for whom they received it in the first instance. The warehouse slips delivered to plaintiffs were in no sense warehouse receipts, in the sense those terms are used in the statute. No warehouse receipts were issued when the grain was received. As the grain was received for plaintiffs, common prudence would require defendant to secure specific directions to that effect from the storers before shipping the grain on the order of Patterson. This they failed or neglected to do, and the loss must fall upon the warehouseman. Unless such precautions are observed, it is obvious there would be no safety for the storers of such commodities.

The judgment of the appellate court will be affirmed.

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### LITTLE ROCK, MISSISSIPPI RIVER AND TEXAS RY.

v.

HARPER & WILSON.

(44 *Arkansas Reports*, 208.)

When a carrier contracts for exemption from liability for losses occurring by fire, the owner of goods lost by fire cannot recover for them without affirmative proof that the fire was the result of negligence.

APPEAL from Drew Circuit Court.

*J. M. Moore* for appellant.

*McCain & Crawford*.

SMITH, J.—This action was to recover the value of goods which the railway company had received and undertaken to transport over its line, but which were burned on the company's wharf-boat at Arkansas City. The bill of lading stipulated for exemption from liability for loss by fire, but the complaint averred that the fire was a negligent one. The answer denied negligence, and upon this issue the parties went to the jury, who found for the plaintiffs.

One assignment in the motion for a new trial alleges that there is no legal evidence to support the verdict. The bill of lading is dated June 17, 1880, and the goods were to be conveyed from Memphis to Arkansas City on the steamer Vicksburg, and thence over the defendant's road to Monticello. On the 20th of June, about 6 A.M., the wharf-boat in which the goods were, and which

was used as the defendant's depot or warehouse, was discovered to be afire, and the same, with its contents, was consumed. The origin of the fire is unknown, but all the evidence tends to prove it was accidental. The boat was in first-rate condition, and adapted to the purpose for which it was used. No fires were kept on it for cooking or other purposes, and it was manned with a mate and a watchman. The mate was absent at the time, having gone for his breakfast, but the watchman was aboard or on the stage plank. No houses or chimneys were nearer than two hundred and fifty yards, and no steamboats had passed on the river later than 4 A.M., when one which had called at the wharf-boat departed. The boat was worth \$7500 or \$10,000, and was insured for \$6000.

This was the substance of the evidence, and it was utterly insufficient to base a verdict upon. The carrier having contracted for exemption from responsibility for losses occurring by fire, the plaintiff could not recover without affirmative proof that the fire was the result of negligence. L. R., M. R. & T. Ry. v. Talbot, 39 Ark. 523; s. c., 18 Am. & Eng. R. R. Cas. 598.

The testimony has no tendency to prove the issue, and this is not a case where it can be said *res ipsa loquitur*. For fires of whose cause no intelligent explanation can be given are not of such unusual occurrence that the jury might infer negligence in the defendant's servants from the mere happening of the accident.

Reversed and remanded for a new trial.

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## CHICAGO, ST. LOUIS AND NEW ORLEANS R. R. Co.

v.

Moss & Co.

(60 Mississippi Reports, 1003.)

Whether the special contract of a railroad company with a shipper for the carriage of cotton on open or flat cars is a contract against the negligence of the carrier, on the theory that such mode of transporting cotton is *per se* negligence, and may on that ground be avoided by the shipper who sustains a loss of cotton thus being transported. *Quære*.

In an action against a railroad company for the value of cotton lost by fire while being transported upon the flat cars of the defendant, under a special contract in which the shipper agreed that the cotton might be carried on such cars, the court instructed the jury in behalf of the plaintiff that "it was the duty of the defendant to take due precaution to protect the cotton from loss by fire, and to provide all suitable means and appliances to prevent said cotton from catching fire, and for extinguishing it if it should catch; and if the cotton was destroyed by fire by reason of defendant's failure to provide such appliances or take such precaution, then the defendant is liable notwithstanding the special contract." It cannot be said that this instruction had the

effect to deny the right of the defendant to carry the cotton on flat cars, when the other instructions, those refused as well as those given, indicate that such right of the defendant was not controverted, and the evidence points to the conclusion that the "means and appliances" referred to in the instruction were buckets of water which a rule of the defendant required to be kept on each flat car carrying cotton, but which were not on the cars in this instance.

Where goods, being transported by a common carrier under a special contract by which his common-law liability as an insurer is limited, are lost, and the owner brings an action to recover the value thereof, the defendant, in order to avoid liability therefor, must show not only that the loss resulted from a cause concerning which he had contracted for immunity, but also that he was not guilty of any negligence in respect thereto. The duty of the carrier to prove the absence of negligence on his part arises from the terms of the contract, from the character of his occupation, and from the rule of evidence requiring the facts to be proven by that party in whose knowledge they peculiarly lie.

#### APPEAL from the Circuit Court of Montgomery county.

Moss & Co. delivered to the Chicago, St. Louis & New Orleans Railroad Company forty-six bales of cotton to be transported by the latter from Winona, Miss., to New Orleans, La. There was indorsed upon the receipt given Moss by the railroad company a contract in the following language: "In consideration of a reduction from the regular rate of freight on cotton, the shipper or consignor accepts this receipt with the special agreement or understanding that the carrier (the Chicago, St. Louis & New Orleans R. R. Co.) shall not be held liable for loss or damage by fire or water, and shall have the right, at its convenience or option, to transport wholly or in part the cotton described in this receipt, in box cars or flat cars, without incurring liability by reason of such mode of transportation." The cotton was put on flat open cars, and while *en route* to its point of destination was consumed by fire. Moss & Co. brought an action against the railroad company to recover the value of the cotton thus lost. On the trial of the case the following, amongst other instructions, were given for the plaintiffs: "5. If the jury believe from the evidence that the defendant, being a common carrier of goods for hire, received from the plaintiffs forty-six bales of cotton to be by said defendant transported and delivered in New Orleans, then it was the duty of said defendant to take due precaution to protect said cotton from loss by fire, to provide all such suitable means and appliances to prevent said cotton from catching fire, and then for extinguishing it after it should catch; and in considering the question as to whether or not the defendant did this the jury will take into consideration the character of the cotton, as whether of a highly inflammable and combustible nature, and its liability to ignite, and if they find that such reasonable precautions were not taken, and the cotton was destroyed by fire, by reason of defendant's failure to provide such appliances, or to take said precaution, then the defendant is liable, notwithstanding any special contract

entered into; that if the loss to plaintiffs can be ascribed to a failure to do what diligence and care would suggest was feasible to have been done, then the railroad company cannot shield itself behind a special contract to exempt it from liability."

"6. If the jury believe from the evidence that the plaintiffs delivered forty-six bales of cotton to the defendant to be by the defendant transported to New Orleans, and that while the cotton was in course of transportation it was destroyed by fire, then the defendant must show by testimony that, not only the fire, but the loss, was occasioned without fault or neglect on the part of itself or its agents or servants, and any neglect, however slight, that brings about said loss will prevent the defendant from availing itself of the special contract to escape liability."

Such parts of the evidence and other parts of the instructions as are considered by the court are sufficiently indicated in the opinion. The verdict and judgment were for the plaintiffs, and the defendant appealed.

*W. P. & J. B. Harris* for the appellant.

*Cachoon & Green* for the appellees.

M. Green, of counsel for the appellees, argued the case orally.

COOPER, J.—The question whether a common carrier may, by special contract, secure exemption from his common-law liability as insurer of goods where the loss or injury results from his own negligence, has been differently answered by the courts of the different States. Those of New York, following the English decisions, hold that he may contract for immunity even as against the gross negligence of himself or servants. *Smith v. C. R. R.*, 24 N. Y. 222; *Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. R. R.*, 7 Hun, 399.

In some of the States a distinction is drawn between gross negligence, as to which protection by contract is not allowed, and slight or ordinary negligence from the effects of which immunity may be gained by agreement. *Hutchinson on Car.*, sec. 260, and authorities there cited.

In this State it is settled that a contract by which a common carrier stipulates for exemption from liability for losses occurring from his own negligence of any grade is against public policy and void. *Whitesides v. Thurlkill*, 12 Smed. & M. 599; *Express Co. v. Moon*, 39 Miss. 822; *R. R. Co. v. Weiner*, 49 Miss. 725; *Railroad Co. v. Faler*, 58 Miss. 911; s. c., 9 Am. & Eng. R. R. Cas. 96.

In *Railroad Co. v. Faler* it was said that it was negligence *per se* for a railroad company to transport so inflammable a material as cotton on an open, unprotected car. In that case the shipper had agreed to take upon himself the risk of loss by fire, but had not agreed that the cotton might be carried on open cars. In this case

there was an express contract by which the shipper agreed, in consideration of a reduction in freights, that the cotton might be so transported and that he would carry the risk of loss by fire. Whether the carriage of cotton on open cars is negligence in the sense that even by contract immunity may not be secured by the carrier against loss, or whether it is only a less safe means of transportation which the carrier may not employ without the assent of the shipper, but by contract with him may acquire the right to use, and free himself from liability for loss arising from such course of shipment where there is no negligence on the part of the carrier, we do not find it now necessary to decide, as this case was tried in the court below upon the theory that the special contract was valid.

The instructions given by the court below on the application of the plaintiffs were objected to by the defendant, and are assigned as error here.

By the fifth instruction for the plaintiffs the court charged the jury that "it was the duty of the defendants to take due precaution to protect the cotton from loss by fire, and to provide all such suitable means and appliances to prevent said cotton from catching fire and then for extinguishing it if it should catch, and in considering the question as to whether the defendants did this, the jury will take into consideration the character of the cotton as to whether inflammable and combustible, and its liability to ignite, and if they find that such reasonable precautions were not taken, and the cotton was destroyed by fire by reason of defendant's failure to provide such appliances or take such precautions, then the defendant is liable, notwithstanding the special contract." Other instructions were given announcing practically the same proposition. It is now argued by the appellant's counsel that the effect of this instruction was to deprive the defendant of the privilege it had acquired to transport the cotton on open cars, because, as is said, the "appliances necessary to prevent said cotton from catching fire" necessarily meant some covering impervious to fire. A careful examination of the record impresses us with the conviction that this was not the construction put upon these words on the trial in the lower court. It was there assumed that the special contract under which the cotton was being carried was valid, and the contract evidently contemplated a transportation of the cotton on open cars without the protection of covering. The defendant obtained an instruction that it might, by contract with the shipper, acquire the right to carry the cotton on flat cars, and another that "if the plaintiffs agreed with defendant for a consideration, that the defendant might transport the cotton on flat cars, then plaintiffs assumed all the risks to which cotton thus shipped was ordinarily exposed, after due care, caution, and protection on the part of the carrier." The court also refused an instruction asked by the plain-

APPLIANCES TO  
PREVENT COTTON  
FROM TAKING  
FIRE, HELD TO  
MEAN WATER  
AND BUCKETS.

tiffs, in which it was announced that it was negligence on the part of the carrier to carry the cotton on any other than the safest vehicle in use for carrying the particular property. From these instructions it appears to us that if the plaintiffs had, in argument to the jury or otherwise, attempted to construe the instruction given for them as requiring the defendant to cover the cotton, an additional and qualifying instruction would have been asked by the defendants. It appears that a rule of the defendant required buckets of water to be carried on each flat car loaded with cotton, and that when the cotton which was burned near Winona was discovered to be on fire there were no such buckets on the car. In view of the character of the instructions given, and of this testimony, we must assume that this water was "the appliance" to prevent the firing of the cotton, the absence of which was pointed on by counsel for the plaintiffs. Viewed in this light, the instruction was not erroneous.

The court, on the application of the plaintiff, also instructed the jury that it devolved on the defendant to prove not only that the loss occurred by the expected cause under the special contract, but also that such loss by such was without negligence on the part of defendant or its employees. This is also assigned for error. Where goods are received for transportation by a common carrier, under a special contract by which his common-law liability as insurer is limited, it is held by a number of courts (in fact, by a majority of them) that the carrier, having proved the loss to have occurred by reason of the expected cause, it then devolves upon the shipper to establish the negligence of the carrier, failing in which he cannot recover. Such is the rule in the courts of the United States, of Pennsylvania, of New York, Louisiana, Missouri, and probably of other States. *Clark v. Barnwall*, 12 How. 279; *Transportation Co. v. Downer*, 11 Wall. 129; *Patterson v. Clyde*, 67 Pa. St. 500; *Colton v. Railroad*, Id. 211; *Lamb v. Railroad*, 46 N. Y. 271; *Cochran v. Dismore*, 49 N. Y. 249; *Steers v. Steamship Co.*, 57 N. Y. 1; *Read v. Railroad Co.*, 60 Mo. 199; *N. O. Ins. Co. v. Railroad Co.*, 20 La. An. 302; 24 La. An. 100.

On the other hand, it is said by Mr. Greenleaf, and it is held in a number of the States, that under such contracts the burden is upon the carrier to show not only the loss by the expected cause, but also that he himself was free from fault. 2 Greenl. on Ev., sec. 219; *Swindler v. Hilliard*, 2 Rich. 286; *Baker v. Brinson*, Id. 201; *Graham v. Davis*, 4 Ohio St. 362; *United States Express Co. v. Blackman*, 28 Ohio St. 144; *Berry v. Cooper*, 28 Ga. 543; *Steele v. Townsend*, 37 Ala. 247; *Gray v. Mobile Co.*, 55 Ala. 387; *Brown v. Adams Express Co.*, 15 W. Va. 812.

And such would seem to be the rule in Connecticut and Illinois. *Harper Bros. v. Railroad Co.*, 37 Conn. 272; *Dunspeth v. Wade*.

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LIGENCE.

3 Ill. 285. The doctrine that the burden of proof under such circumstances is upon the plaintiff to establish negligence first found expression in the courts of the United States in the case of *Clark v. Barnwell*, which was decided by a divided court. The rule there announced has, however, been uniformly adhered to by the courts of the United States and has been adopted by those of many of the States.

When first announced it was apparently based upon the proposition that by the contract the carrier ceased to be a common carrier and became a simple bailee for hire. In *Lamb v. Railroad Co.*, 46 N. Y., Grover, J., in delivering the opinion of the majority of the court, said: "The defendant was exonerated from all liability as carrier for a loss by the destruction of the cotton by fire. Relieved of this responsibility, it was liable only, in case it was destroyed, as bailee for hire." In *York Co. v. Central R. R.* 3 Wall. 107, Mr. Justice Field said: "By the special agreement the carrier became in reference to the particular transaction an ordinary bailee and private carrier for hire." But an ordinary bailee or private carrier may, by special contract, regulate the degree of diligence which shall be required of him. The next step, therefore, taken by common carriers was in the direction of contracting against their negligence or misfeasance as a private carrier might do. That they might do this necessarily and logically followed from the principles announced. But the courts took alarm when they contemplated the results, and denied that a common carrier could by contract exempt himself from losses occurring from his own negligence. To do this it was necessary to decide that by such contract a common carrier could not divest himself of his character as such and become an ordinary bailee or private carrier for hire. In *Railroad Co. v. Lockwood* the point was presented, and the court, in deciding the case, said: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. That is, he may make any contract whatever, because he is bailee, and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by reason of their occupation, not by virtue of the responsibilities under which they rest. . . . The theory occasionally announced, that a special contract as to the terms and responsibilities of a common carrier changes the nature of the employment is calculated to mislead. The responsibilities of a common carrier may be reduced to those of any ordinary bailee for hire, whilst the nature of his business renders him a common carrier still." In support of this principle the court relies on the case of *Davis v. Graham*, 2 Ohio St.; *Graham v. Davis*

& Co., 4 Ohio St. ; Swindler v. Hilliard, 2 Rich. ; Baker v. Brinson, 9 Rich., and Steele v. Townsend, 37 Ala., hereinbefore cited, in each of which cases it was distinctly decided that a common carrier did not, by reason of a special contract, lose his character as such, and because he did not, that the burden remained on him of showing, in case of loss, not only that the loss occurred by reason of the excepted cause, but also that it happened without any fault on his part. As was said in these cases, the law which forbids a common carrier to contract for immunity against loss arising from his own negligence practically inserts, as if written in the contract after each stipulation for exemption, the words "Provided such loss occurs without any negligence of the carrier or his agents." Any loss, therefore, which occurs in any other manner than by the excepted cause, and without the fault of the carrier, is not within the terms of the contract. It is a familiar rule, both of pleading and evidence, that a half defence is no defence, and this it would seem would cast upon the common carrier the necessity to plead, and to sustain by proof all the facts necessary to his exoneration. If, on the contrary, the rule announced by the Supreme Court of the United States is to govern, and, if as was said in *Railroad Co. v. Lockwood*, the common carrier does not, by reason of the special contract, become a mere bailee or private carrier, as it was said in *York v. Railroad Co.*, that he did, then the question arises, what degree of negligence is the shipper required to show? If the "responsibility" of the carrier is only that of a bailee or private carrier for hire, it would, it seems, be necessary for the shipper to show such negligence or want of care as would render liable a bailee or private carrier for hire; while on the other hand, if the "nature of his employment" (that of a common carrier) is the test of diligence and care required of him, then it would seem that the plaintiff should recover upon proof of an absence of that care and diligence which is required of a common carrier. In escaping from one difficulty we would thus encounter another equally perplexing. To us it also seems that public policy forbids the further relaxation of the principles of the common law governing common carriers. It is no uncommon thing in this age to see under one management a line of railroads extending from the lakes of the north to the Gulf of Mexico, or from the Atlantic to the Pacific Ocean. To hold that a shipper in New York or Chicago shall be required to establish the negligence of the carrier by proof of the circumstances of a fire in California or New Orleans would in a great number of cases result in a verdict for the carrier, even though there was in fact negligence. In a large majority of cases the facts rest exclusively in the knowledge of the employees, whose names and places of residence are unknown to the shipper. In many cases the witnesses are the employees whose negligence has caused the loss, and if known to the shipper it may be dangerous



for him to rest his case upon their testimony, since the natural impulses of mankind would sway them in narrating the circumstances to palliate their fault by stating the occurrence in the most favorable light to themselves. All the authorities hold that it devolves upon the carrier to show the loss to have occurred by the excepted cause. In doing this it will add but little to his burden to show all the attending circumstances; and that the burden rests upon him to do so and disprove his own negligence, we think, arises from the terms of the contract, from the character of his occupation, and from that rule governing the production of evidence which requires the facts to be proved by that party in whose knowledge they peculiarly lie.

The judgment is affirmed.

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CHICAGO, ST. LOUIS AND NEW ORLEANS R. R. Co.

v.

ABELS.

(60 *Mississippi Reports*, 1017.)

A common carrier has the right by special contract to stipulate for exemption from the liability imposed upon him at common law, but he cannot thus secure exemption from the consequences of his own negligence or misconduct.

In an action by the owner for damages to property shipped the burden of proof is upon the common carrier to prove the existence of a special contract of shipment, if there be one, and to prove that the injury complained of resulted without his fault, from some cause excepted by the contract.

What is due care and diligence on the part of a common carrier is a question which depends upon the circumstances and the nature of the article shipped.

A., the owner, shipped certain stock to Durant by the Chicago, St. Louis & New Orleans R. R. Co., upon a special contract. On the passage a mule was injured. It was taken off the cars at Durant in the presence of the company's station agent, who saw its injured condition. A. refused to receive the mule, and it was allowed to run on the commons at Durant. He brought an action against the railroad company to recover the value of the mule. The special contract of shipment provided that as a condition precedent to a right of recovery for such injury the shipper should give notice in writing to the agent of the carrier of his claim for damages "before said stock is removed from the place of destination and before such stock is mingled with other stock." On the trial the court below refused to instruct the jury that the plaintiff could not recover because of his failure to give notice in writing to the agent of the defendant of his claim for damages. *Held*, that the instruction was properly refused, as there was no removal of the mule from the place of destination, and no mingling of it with other stock, in the sense of the above stipulation.

A common carrier cannot avoid payment of full damages to property which

he has undertaken to transport, by showing a special contract limiting in advance his liability to an amount less than the real loss sustained by the shipper.

**APPEAL** from the Circuit Court of Holmes County.

G. D. Abels being the owner of nine head of horses and one mule, shipped the same from New Haven, Ky., to Durant, Miss., a station on the line of the Chicago, St. Louis & New Orleans R. R. Co., under a special contract of shipment, containing, among others, the following stipulation: "In consideration that the said party of the first part (the Railroad Co.) will transport for the party of the second part (Abels) one car-load of horses and mules (ten head, more or less) from New Haven, Ky., to Durant Station, at the rate of \$120 per car-load and a free passage to the owner or his agent on the train with the stock, the same being a special rate, lower than the regular rate mentioned in said tariff, the said party of the second part thereby relieves said party of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be only that of a private carrier for hire. And said party of the second part hereby accepts for such transportation the cars provided by said company and used for shipment of such stock, and hereby assumes all risk of injury which the animals, or any of them, may receive in consequence of either or any of them being wild, unruly, or weak, or maiming each other or themselves, or in consequence of heat or suffocation, or other ill effects of being crowded in the car. or of loss or damage from any cause or thing not resulting from the negligence of the agents of the said party of the first part."

The mule was injured on the trip, and when the car-load arrived at Durant Abels refused to receive the mule and it was turned loose upon the commons. He brought the suit to recover the value of the mule, a verdict was returned in favor of the plaintiff, and from such judgment the railroad company appeal to this court.

*W. P. & J. B. Harris* for the appellant.

*G. P. Allen* for the appellee.

**CAMPBELL, C. J.**—A common carrier may, by special contract, stipulate for exemption from the liability imposed by the common law, but may not thus secure exemption from the consequences of negligence or misconduct.

The burden is on the carrier relying on a contract stipulating for a restricted liability to prove it, if it is not proved by the other party, and to show that the injury complained of resulted without fault on the part of the carrier from some cause excepted by the contract. The carrier in such case must show, at least *prima facie*, that the injury did not result from neglect. It would then devolve on the other party to produce evidence to fasten blame on the carrier for

ONUS ON CARRIER TO PROVE EXEMPTION FROM LIABILITY.

the injury. If it appeared that the injury was excepted by the contract, and that no want of care and diligence on the part of the carrier in the particular case contributed to the injury, the loss should fall on the shipper according to the stipulation of the contract.

The carrier must show a full performance of duty with respect to what was shipped, according to its nature, and when that showing is made, and that the injury was from an excepted cause in the contract, liability cannot be fixed on the carrier, except by proof of a want of due care and diligence. What is due care and diligence by the carrier must depend on circumstances and the nature of the article shipped.

In case of injury to living animals which may be caused by each other, or by the inherent liability to sickness and death or self-inflicted injury in close confinement, if the carrier does all towards their safe carriage which should be done, and still injury results, no responsibility should be fastened on the carrier.

DUE DILIGENCE  
IN CARING FOR  
ANIMALS.

In this case the car was suitable and the road-bed good, and the transportation speedy and safe, so far as respects the delivery at Durant of the car containing the mule and horses. There is no imputation on the capacity or vigilance of the employees on the train. There is evidence that the mule was found "down" in the car at Water Valley by the conductor, who "got it up," and the testimony shows that at each stop between that point and Durant observations was made to see if the mule was down again, and it was not discovered in that condition.

FACTS.

There is evidence that the mule was down about the time of the arrival of the train at Durant, and was trampled by the horses. There is nothing to show when the mule was prostrated, nor from what cause. It may have been sick and unable to stand, or preferred a reclining posture, or it may have been overborne by the horses resenting the unequal association with an inferior animal in the close contact of the crowded car. Certainly, there was nothing surprising in the misfortune of the mule, and nothing calculated to suggest any dereliction of duty by the carrier with respect to it.

The court refused to instruct the jury that the plaintiff could not recover because of his failure to give notice in writing to the agent of the carrier of his claim for damages, there being a stipulation in the contract of shipment that a condition precedent to the right to recover for any injury was notice in writing, "before said stock is removed from the place of destination. . . . and before such stock is mingled with other stock." Whatever view may be taken of such a stipulation in other circumstances, it was proper in this case to refuse to make the right of the shipper to recover to depend on compliance with the requirement of notice of his claim, as specified in the contract.

NOTICE OF CLAIM  
WHEN NOT RE-  
QUIRED.

It does not appear that there was any removal of the mule from Durant, which was the "place of destination," or that there was any mingling with other stock in the sense of the stipulation, and the station agent of the carrier at Durant was present when the mule hobbled out of the car at the place of delivery.

The court did right to refuse to instruct the jury that the limit of the plaintiff's right of recovery was one hundred dollars. The contract contains a stipulation that, "should damage occur, . . . the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, \$200; for a horse or mule, \$100; cattle, \$30 each; other animals, \$15 each." The evidence showed the mule would have been worth \$140, or more, in Durant, if sound and in good condition. There was no evidence of its value at the place of shipment, but it is a just inference that it was worth more than \$100 there.

If in fault, the carrier should make compensation by paying the damage done, and should not be allowed to stipulate in advance for a diminished liability below the real loss sustained by the fault which creates liability. To allow that would defeat the politic rule against stipulating for exemption from the consequences of negligence or misconduct.

We find no fault with the action of the court on the instructions, but because of the allowance of an attorney's fee, the judgment will be reversed, and, under our view of the evidence, we decline to permit final judgment here on a *remittitur* of the attorney's fee, and remand the case for a new trial.

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LELAND

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. R. Co.

(*Advance Case, Iowa. April 24, 1885.*)

If goods are destroyed by a fire set by an engine operated by a railway company this is *prima facie* evidence of negligence by such company, and, unless it shows that the fire was not in fact caused by its negligence or want of care, the owner may recover for the goods destroyed. This rule applies although such goods were in the company's custody as a warehouseman and not as a common carrier.

It is the duty of a railway company to keep its warehouses in as safe a condition, and provided with such means and appliances, if any, for extinguishing fires, as ordinarily prudent and cautious men would do under like circumstances.

Where the only evidence to show that the railway company used wood for fuel instead of coal, thus increasing the liability of the engine to emit sparks,

was testimony that a witness had "learned" that such fuel was used, it is erroneous to submit to the jury the question whether there was negligence in the use of fuel. Such testimony is mere hearsay, and warrants no submission of any question to be determined by it.

APPEAL from Floyd Circuit Court.

Plaintiff seeks in this action to recover the value of certain household goods, which he alleges were destroyed by fire. There are two counts in the petition. In the first count it is alleged that said goods were destroyed by a fire which was set out by an engine which was being operated on defendant's railway by its servants and employees, and that said fire was caused by the negligent and careless manner in which said engine was operated. In the second count it is alleged that defendant had received said goods into its warehouse, and had the same in charge, as a warehouseman, for care and safe-keeping, but that it neglected to exercise ordinary care and diligence for the preservation of said property, and neglected to provide appliances and apparatus for the protection of the building in which said goods were stored from fire, by reason of which negligence said building took fire and was consumed, and said goods were destroyed. Defendant's answer was a general denial, and it alleged that said engine was run and operated by a careful and competent engineer, and was provided with the usual and most approved appliances for preventing the escape of fire. There was a verdict and judgment for plaintiff, and defendant appeals.

*George E. Clark* and *D. S. Wegg* for appellant.

*Starr & Harrison* for appellee.

REED, J.—The evidence introduced on the trial shows that the goods in question were delivered to defendant by plaintiff in Chicago before the twentieth of April, 1882, to be transported to Charles City, in this State. They arrived at Charles City on the twentieth of April, and were removed from the cars and placed in defendant's depot. Plaintiff did not call for them, and on the fourteenth day of May following the depot caught fire and was consumed, and the goods were destroyed. There was evidence tending to prove that the fire was caused by sparks thrown out by an engine, which passed the depot on the track a short time before the fire was discovered. There was evidence also from which the jury might have found that it was caused by the burning of a quantity of paper in a stove in the building. The fire first discovered was on the roof, and the station agent and another person went upon the roof with pails of water and put this fire out. It was then discovered that the building was on fire on the inside, under the roof. An effort was made to dash water on this fire, but this was unsuccessful. There were no appliances about the building for extinguishing fire except ordinary water pails, and there were no

ladders there. There was evidence tending to prove that the fire on the inside of the building might have been extinguished by those present if there had been a ladder there, on which they could have got near enough to it to enable them to throw water upon it.

1. The defendant asked the court to instruct the jury as follows: "The provisions of section 1289 of the Code of 1873 do not change the ordinary rule of law in this case. The burden is on the plaintiff to show negligence on the part of defendant, its servants and agents, in order to recover herein, defendant being only liable as a warehouseman." "Section 1289, Code of 1873, is not intended to affect the liability of warehousemen, or to give or create a new right of action against them, but only to change the rule as to the burden of evidence in cases where railway companies set fire to property, the care and custody of which they were not at common law charged with." The court refused to give these instructions, but told the jury that if they found that the fire which destroyed plaintiff's property was set out by an engine which was being operated by defendant on its railway, this would be *prima facie* evi-

WHAT IS PRIMA  
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OF NEGLIGENCE  
IN KEEPING  
WAREHOUSE.

dence of negligence by defendant; and plaintiff, on proof that the loss was caused by a fire set out by defendant's engine, would be entitled to recover unless defendant showed that said fire was not caused by any negligence or want of care on its part.

Defendant assigns these rulings as error. We think they are correct. It is doubtless true that defendant's liability as a common carrier terminated when the goods arrived at Charles City, and were deposited in the depot, ready to be delivered to plaintiff. And its responsibility for their care at the time of the loss was that of a warehouseman. *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa, 60; *Mohr v. Chicago & N. W. R. Co.*, 40 Iowa, 579. But the question of its liability for the damages caused by a fire, set out in the operation of its railway, is not at all affected by the fact that the property injured by such fire was in its custody as a warehouseman. Its duty as a warehouseman is to exercise ordinary and reasonable diligence in the care of the property intrusted to it, and it is liable for any damages which may be occasioned by its failure to perform that duty. In the operation of its railroad it is also required to exercise ordinary diligence to avoid setting out fires which may occasion injury to the property of others; and if it neglects to perform its duty in that respect, and damage thereby results to another, it is responsible therefor. But its duty and liability in that regard are entirely distinct from those arising out of its custody of the property as a warehouseman. They are imposed upon it by positive law, while those of the warehouseman arise out of the contractual relation of the parties.

If defendant was negligent in the operation of its railroad, and the fire which destroyed plaintiff's property resulted from this neg-

ligence, the injury was not occasioned by the breach of any duty which it owed him as a warehouseman, but resulted from its failure to perform the duty imposed upon it by law as to the manner of operating its railway. And the fact that it had the property, which was injured in consequence of this negligence, in its possession as a warehouseman, would not relieve it from liability for the injury; for, notwithstanding that fact, it owed plaintiff the same duty to exercise due care in the operation of its road which it owed to the other members of the public. It is true, as an abstract proposition, that section 1289 of the Code does not create any new rule as to the duties and liabilities of warehousemen. But as there is no effort to charge defendant as a warehouseman on account of the negligence in setting out the fire, this is entirely unimportant. The instructions asked by defendant then, were not applicable to the case under the theory on which plaintiff was seeking to hold it liable for setting out said fire, and they were properly refused. The instructions given by the court are in accord with the holding of this court in *Small v. Chicago R. I. & P. R. Co.*, 50 Iowa, 338.

2. The court gave the following instruction to the jury: "It was the duty of the defendant to keep its warehouse in as safe a condition, and provided with such means and appliances, if any, for extinguishing fires, as ordinarily prudent and cautious men would do under like circumstances." Defendant contends that the rule as to its duty is stated too broadly in this instruction. But we think otherwise. The warehouseman is bound to use ordinary care and diligence for the protection and safe-keeping of the property received by him. Story, Bailm. §§ 444-451. The proper discharge of his duty in this respect would require him to make such provision, and use such care and diligence to protect it from injury by fire as was reasonable under the circumstances. The rule of the instruction is not broader than this. Under it, defendant would be required to take only such precautions and use such diligence for the protection of the property against fire as ordinarily prudent and cautious men would use under like circumstances.

DUTY OF RAIL-  
WAY COMPANY  
AS A WAREHOUSE-  
MAN.

3. The court also gave the following instruction: "If the engine was constructed to burn coal as a fuel, and if the defendant's servants, at the time the fire was set out, used wood or other fuel other than coal, and if the fuel that was used, if other than coal, increased the danger or liability of the engine to emit sparks and set out the fire, the use of fuel other than coal, under such circumstances, would constitute negligence, for which the defendant would be liable." It was shown that the engine which passed the depot a short time before the building was discovered to be on fire was a coal-burner. But there was no evidence which tended to show that the burning of other fuel than coal "increased the danger or liability of the engine to emit sparks

INSTRUCTION  
BASED ON HEAR-  
SAY EVIDENCE IS  
ERRONEOUS.

and set out fire," nor was there any competent evidence that any fuel except coal was being burned in the engine at the time it passed the depot.

A witness who was present at the fire testified, it is true, that he learned at the time that the engine was fired up with wood, and that sparks emitted by it as it passed the depot fell upon the roof and set fire to the shingles. But he did not pretend to have any personal knowledge as to the origin of the fire or the kind of fuel used in the engine. He could not tell even from whom he received the information. His testimony was mere hearsay, and the court was not warranted in submitting any question to the jury to be determined upon it.

The court therefore erred in giving the foregoing instruction, and on that ground the judgment must be reversed.

SEEVERS, J.—I concur in the result reached, but I do not desire to be regarded as bound by the two first points determined in the foregoing opinion.

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BRITISH AND FOREIGN MARINE INSURANCE CO.

v.

GULF, COLORADO AND SANTA FE R. R. Co.

(*Advance Case, Texas. 1885.*)

When a bill of lading and an insurance policy covering any loss of the goods named in the former are signed at the same time, but the policy describes the property as having been already shipped by the carrier, the insurance company will be held to be affected with notice of any reservation in the bill of lading and chargeable with notice of the circumstances of the contract for its transportation entered into between the shipper and the carrier.

Therefore, the insurance company is held to have contracted with the full understanding that in case of loss of the property while in charge of the carrier, and that loss was satisfied by said carrier, it would be entitled to the insurance due upon the property.

To an action by the shipper for the value of the goods the carrier could not plead that it was not liable because of the insurance, and that the shipper must look to the insurance company.

In taking insurance the carrier does not limit its common law liability to the shipper for any loss that may occur. There is no contract of exemption against liability for loss by negligence; no agreement that the carrier shall be indemnified, but the contract is simply that in the contingency of insurance a consequent benefit in case of loss will result to the carrier.

The carrier has the right to insure the goods in his charge by a contract made directly with the insurance company, and this he may do to the extent of their full value.

As between the insurance company and the carrier the former is liable to the latter for any loss of goods occurring.



APPEAL from Galveston Co.

*C. L. Cleveland* for appellant.

*Ballinger, Mott & Terry* for appellee.

WILLIE, C. J.—The important question in this case arises out of the provision contained in the bill of lading executed by the appellee to Z. Murray & Co., to the effect that in case the property was destroyed the carrier liable for the loss should have the full benefit of any insurance effect upon or on account of said property. The question is whether or not, with that reservation in the bill of lading, the appellant, in whose company the insurance had been affected, can recover from the railroad company the value of the cotton destroyed after having paid the sum to the shipper.

It is a conceded fact that the cotton was destroyed by fire, and in such a manner as would not have excused the railroad company at common law. It appears from the record that while the bill of lading and certificate of insurance were both executed on the same day, the former was prior in time, for the certificate of insurance describes the cotton as having been already shipped by the railroad company. Hence, it must follow that the appellant was affected with notice of the reservation contained in the bill of lading. The insurance company, knowing that the property was in charge of the railroad company as a common carrier at the time, is chargeable with notice of the circumstances of the contract for its transportation entered into between the carrier and the shipper of the cotton. This being the case, the insurance company must be held to have contracted with the full understanding that in case of loss of the cotton whilst in charge of the appellee, and that loss was satisfied by the railroad company, the latter would be entitled to the insurance money due upon the cotton, unless the reservation in the bill of lading was such as could not be made and was, therefore, void and of no effect. This disposes of the point made, that the insurance company, being entitled to the shipper's rights and remedies against the carrier, could not be deprived of them by any contract between the carrier and the shipper to which the insurance company was not a party. The insurance company had no rights against the appellee when the bill of lading was signed and the reservation was made, but, on the contrary, the railroad company had all the right which the reservation could give it as against the appellant company at the time the insurance was effected.

If, therefore, the question depended on the right of two parties to interfere with the contract of a third by an agreement between themselves alone, we would be compelled to hold that neither the certificate of insurance nor the transfer by the owner of the cotton

QUESTION  
STATED.

NOTICE OF RES-  
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BILL OF LAD-  
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COMPANY AF-  
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POLICY WRITTEN  
WITH REFER-  
ENCE TO BILL OF  
LADING.

to the insurance company was of any avail, as against the previous contract between the shipper and the railroad company. The whole question, therefore, turns upon the right of the appellee to make the reservation as to the insurance money in its bill of lading.

This right is questioned on the ground that the reservation is in effect a limiting of the common-law liability of a carrier for the loss of goods transported by him, a limitation prohibited by the statutes of our State. It is said that by allowing the carrier to reimburse himself out of the insurance money we relieve him of all responsibility, and permit him to deal with the property in his charge as carelessly and negligently as he pleases, and yet save him from accountability in case of its loss.

It is perhaps true that the carrier is enabled by such contract to indemnify himself for any money he may pay out on account of the loss of the goods, but does this relieve him from responsibility, or limit his liability in the least? To an action of the shipper for the goods he could not successfully plead that he was not liable because of the insurance and that the shipper must look to the insurance company for compensation. It would be no defence to the action, and the carrier has not, therefore, limited his liability to the person with whom he has contracted. The shipper has all the rights and remedies against the carrier he would have possessed had no such reservation been made. If the goods are lost from other causes than the act of God or the public enemy, the carrier is liable; and it is no concern of the owner that after the loss is compensated by the carrier, the latter can seek reimbursement at the hands of some one else.

But it is said to be against public policy to allow such reservations in the bill of lading, because it lessens the necessity for care and diligence on the part of the railroad company in reference to the property in its charge for transportation. This may be so in some measure, but it certainly does not release the company from liability, or place them in the same position as if they had contracted that they should not be liable either in whole or in part for the loss of the goods, unless they would be so liable at common law.

There is a great difference between contracting for a limit of common-law liability and contracting to be fully liable as at common law, but to have the privilege of indemnifying against loss by reason of such liability. Besides, the owner does not bind himself to insure, or to do anything which will result in the benefit of the carrier. "There is, therefore, no contract of exemption against liability for loss by negligence; no agreement that the carrier shall be indemnified, but the contract simply is that in the contingency of insurance, a consequent benefit will, in case of loss, result to the

COMMON - LAW  
LIABILITY OF  
RAILWAY COM-  
PANY NOT LIMIT-  
ED BY STIPULAT-  
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carrier." *Rintoul v. N. Y. Central & H. R. R. Co.*, 16 Am. & Eng. R. R. Cas. 144.

The carrier has the right to insure the goods in his charge by a contract made directly with the insurance company, and CARRIER MAY INSURE. this he may do to the extent of their full value. *Fland.* on Ins. 380; *May* on Ins. 80; *Lawson* on Con. of Carriers, 391, 392; *Hutchinson* on Con. of Car. sec. 429; *Van Natta v. Ins. Co.*, 2 Sandf. 990; *Ins. Co. v. Cobbs*, 20 N. Y. 177. This is upon the principle "that every person who would be liable in the event of the loss of the property may effect an insurance for his own protection." *Hutch.* on Car., sec. 429.

The carrier needs no protection against losses for which he is notliable under his contract with the shipper; and if not allowed to insure against those for which he is liable, the policy of insurance is of no use as a protection to himself. It is clear that if the want of power in a carrier to limit his common-law liability deprives him of his right to indemnify himself against loss, he cannot contract for such indemnity directly with an insurance company any more than he could through his agreement with the owner of the property. If we look to the effect or result of the two contracts, we find that the carrier's liability is restricted as much by the one as by the other, and if the one is against public policy the other is also. If there be any difference it is restricted to a greater degree by the contract made by the carrier with the insurance company. That positively indemnifies him against loss; the other indemnifies only upon the happening of a contingency.

When a railroad company, as in the present instance, pursues the latter course, and the owner insures and a loss covered by the policy and the bill of lading occurs, the INSURANCE COMPANY LIABLE TO CARRIER. railroad stands substantially in the same position toward the shipper and the insurance company as if it had insured by direct contract. The railroad company is primarily liable to the owner of the goods for their value if destroyed. The insurance company is also liable to the owner to the extent of the loss covered by the policy in trust for the benefit of the carrier. The owner has a right of action for the value of his property, either against the railroad company or against the insurer.

We have seen that the fact that the carrier had a right to reimburse himself from a third party for losses under the bill of lading forms no defence to an action against him by the shipper. He must pay the value of the property destroyed and then bring suit against the party liable to him under the contract of insurance. This is the case whether the carrier has insured or has reserved the benefit of the insurance obtained by the owner, especially under our system of jurisprudence, when suits may be prosecuted in the name of the true or equitable owner of the cause of action.

But if the insured proceeds first against the insurer and recovers

under the policy, or it is paid by the latter without suit, can he then bring suit upon the bill of lading against the carrier?

A complete answer to such suit, although brought for the benefit of the insurer, would be the reservation contained in the bill of lading, to which the plaintiff was a party. To recover the value of the property destroyed and appropriate it to the insurance company would be in direct violation of that stipulation, and the suit brought directly by the insurer is in no better condition. The right to assert such a stipulation as the present, in a bill of lading, is universally admitted, or denied, if at all, only on the ground of the supposed effect it has of restricting the common-law liability of a carrier. This, as we have chosen in our own view, is not the effect of the reservation. If it is a legal stipulation it must have some effect, and if it does not protect the carrier against losses which he must make good under the bill of lading it is entirely nugatory.

The right of the insurance company to recover against the railroad, if it existed at all, was the result of an equitable subrogation to the remedy of the owner of the cotton against the carrier, and of the assignment made subsequent to its loss. But the assignment was doubtless, as it was made in privity and subordination to the previous stipulation placed in the bill of lading, and the subrogation was of no avail, as no one can become subrogated to a right which the party originally possessing that right had previously contracted should not be enforced.

The question is of the first impression in Texas, and, as controlled by a statute similar to our own upon the subject of common carriers, has perhaps never received the adjudication of a court of last resort. Sec. 30 N. Y. Rep. It has, however, in two or three instances been passed upon, and in accordance with our own views, by courts of eminent learning, to whose opinion great deference is due. *Caestian v. Ins. Co.*, 16 Am. & Eng. R. R. Cas. 142; *Rintoul v. Railroad Co.*, *Idem*, 144; *Lawson on Con. of Car.* p. 383.

We think that the court did not err in rendering judgment in favor of the defendant below, and that judgment is affirmed.

**Affirmed.**

JACKSON Co.

v.

BOYLSTON INSURANCE Co.

(Advance Case, Massachusetts. June 24, 1885.)

The right of an insurance company insuring a property *in transitu*, to be substituted to the rights of the insured as against the common carrier upon paying a loss, is subject to the owner's contract of carriage with the railroad company, provided there be no fraudulent concealment from the insurer. An insurance company insuring property *in transitu*, and making no provisions in regard to the nature of the contract of carriage, must be held to have insured subject to the actual contract of carriage so far as it was a lawful contract.

CONTRACT to recover upon a policy of insurance for the loss of thirty-six bales of cotton destroyed by fire. The case was heard by a single justice, who held the defendant liable and found for the plaintiff. It was thereupon reported for the consideration of the full court.

*E. Mervin* and *R. H. Gardiner, Jr.*, for plaintiff.

*C. A. Prince* and *F. Peabody*, for defendant.

DEVENS, J.—The action is on a policy of insurance, by which the defendant insured the plaintiff on cotton in transit between ports and places in the United States and the plaintiff's mills in New Hampshire. The cotton was bought by one Ivy, FACTS. as broker for the plaintiff, and shipped by him, by the Atlantic & West Point R. R. Co. and connecting lines. It was in two lots, and Ivy, attaching the two railroad receipts to a draft, drew on the plaintiff for the amount of the purchases. The draft, with the railroad receipts attached, was received by the plaintiff's treasurer, on October 17, 1883, and paid on presentation, after which he gave notice to the defendant of the shipments and presented the policy, that they might be indorsed thereon, which was done. The railroad receipts, given on behalf of the Atlantic & West Point R. R. Co. and connecting lines, contained a stipulation, that, in case of loss or damage to the cotton sustained during transportation, whereby legal liability was incurred, only that company should be responsible in whose actual custody the cotton was at the time of the occurrence; and, further, that "the company incurring such liability shall have the benefit of any insurance which may have been effected upon, or on account of, said cotton."

Ivy did not read the railroad receipts, and it does not appear whether he did or did not know their contents, so far as the clause relating to insurance is concerned. The railroad receipts were not

sent to the defendant, nor their contents communicated, nor did it ask to see them. It did not appear that the defendant knew whether they were received. The plaintiff's treasurer did not read them, nor did he or the plaintiff know that they contained this clause, nor did they know that receipts containing such a clause would be or were likely to be taken, and no fraud or concealment from defendant was intended.

While in transit and in the actual custody of the South Carolina R. R., a common carrier, and one of the connecting lines of the Atlantic & West Point R. R., and in the State of South Carolina, thirty-six bales of the lot of cotton, before described, were destroyed by a fire, the origin and cause of which are unknown. For the value of these this action is brought.

It is the contention of the defendant that, whether the contract between the plaintiff and the carrier is governed by the law of Massachusetts, Georgia, or South Carolina, it was, so far as it is stipulated, in favor of the carrier for the benefit of any insurance that might have been effected, valid and binding upon the plaintiff.

While this question has been thoroughly discussed on both sides and with careful examination of statutes and decisions in each State, it will not be necessary to decide it. In the view we take of the case, we shall assume, in favor of the defendant's contention, that the stipulation was valid and binding between the plaintiff and the carrier.

If it be thus held, the defendant then contends that this was a contract in violation of the defendant's rights, and rendered the policy void, for the reason that when the insurer of goods in the custody of a carrier pays the loss on the goods insured to the owner, he is ordinarily entitled to be put in the place of the owner and clothed with all his rights. *Hart. v. West R. R.*, 13 Metc. 99. The defendant further contends that, this being the well-recognized law at the time of the contract of insurance, both plaintiff and defendant must have contemplated this right of subrogation in case of loss, and if the plaintiff has destroyed it by a contract which would deprive the defendant of this right, the policy is avoided.

Subrogation is the substitution of one person in place of another, whether as a creditor or the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities. It does not necessarily depend upon contract, but grows out of the relation which two parties sustain to each other, and the party subrogated acquires no greater rights than those of the party for whom he is substituted. The contract of insurance being one of indemnity, the insurer, when he has indemnified the insured, is equitably entitled to succeed to the right which he had against the carrier. But, as the insurance company obtains its remedy against the carrier, not by virtue of any

SUBROGATION.  
RAILWAY COM-  
PANY MAY IN-  
SURE THROUGH  
SHIPPER.

contract of its own with him, but through the contract of the owner of the goods, such owner may make the contract of carriage so as to suit his own interest, provided there be no fraudulent concealment from the insurer, and the right which the insurer obtains is subject to the agreement made with the carrier. Carriers have an insurable interest in the goods they transport, and may, therefore, effect insurance upon them for their own benefit. There is no reason why they may not insure them jointly with the owner, and, if so, why they may not contract for the benefit of insurance effected by the owner, in the absence of fraud, or of any contract to the contrary, with the insurer. *Chase v. Wash. Ins. Co.*, 12 Barb. 595; *Van Natta v. Sec. Ins. Co.*, 2 Sandf. 490.

The defendant contends that, by reason of the existence of this right of subrogation, the plaintiff has obtained its insurance at a lower rate than it otherwise would have done; but it is also true that, by an agreement that the carrier shall have the benefit of the insurance, he has probably obtained the carriage of his goods at a lower rate of transportation. The insurer, as against the carrier, is entitled to preference, only when there is no agreement to the contrary, and the insured thus has a claim against the carrier. If the carrier may insure on his own account, he may contract with the person whose goods he carries that such person shall insure for his benefit. While the question has not been the subject of discussion in this Commonwealth, these remarks are well sustained by respectable authorities elsewhere. *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Bliss. 18; *Rintoul v. N. Y. Cent. R. R.*, 16 Am. & Eng. R. R. Cas. 144.

The case of *Carstairs v. Mechanics & Traders' Ins. Co.*, 16 Am. & Eng. R. R. Cas. 142, is distinguishable by the important fact that it was there expressly stipulated that, in case of loss, the insurance company should be subrogated to all claims against the transporter.

There is no ground, in the case at bar, upon which any fraud or concealment can be asserted. The receipts, which would be given for carriage, the plaintiff well knew, would be various, as the cotton would pass through States controlled by different laws. The right of the owner so to contract that the carrier should have the benefit of his insurance, the defendant must have known had been asserted, as it became a subject of judicial decision as early as 1859. *Mercantile Ins. Co. v. Calebs*, *ubi supra*. It made no inquiries, and the plaintiff's officers did not know of the existence of the clause. Nor can the position of the defendant that this agreement was in violation of the clause in the policy by which it agreed that "this insurance shall be void in case the policy, or the interest insured thereby, shall be sold, assigned, transferred, or pledged without the consent, in writing, of the insurers," be main-

tained. The policy, and the interest in it, is still retained by the owner; it is neither transferred nor pledged.

It being conceded that the contract between the plaintiff and the carrier was binding and valid, we are brought to the conclusion, expressed in the ruling of the judge who presided at the trial, that "in a case where there was no intention to deprive the insurance company of its rights and no intentional fraud and concealment, and where the plaintiff itself was actually ignorant of the stipulation relied on at the time it made the insurance, or obtained the indorsement on the policy, and was ignorant, when it ordered the cotton, that any stipulation would be made, and there was no actual misrepresentation, an insurance company insuring property *in transitu*, and making no provision in regard to the nature of the contract of carriage, and not requesting to see the bill of lading or receipt, and making no inquiries about them, must be held to have insured it under and subject to the actual contract of carriage, so far as it was a lawful contract."

The defendant has no just ground of complaint against the ruling, which was in these terms.

Judgment on the verdict.

**Right of Subrogation between Carrier and Insurer in Cases of Loss for which each is Liable.**—It is well settled that in the absence of any clause in the bill of lading giving the carrier the benefit of insurance, the insurer has the right of subrogation against the carrier. Thus in the case of *Hall & Long v. Railroad Cos.* 13 Wall. 370, STRONG, J., says: "It is too well settled by the authorities to admit of question, that as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be the first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner." See also *Hart v. Western R. R. Corp.*, 13 Metc. 105.

**Basis of Insurer's Right of Subrogation as against Carrier.**—It seems equally well settled that the right of subrogation which an insurer who has paid the loss has against the carrier does not rest upon the principle of contract express or implied, but wholly or equitable considerations apart from contract right. *Mobile & Montgomery R. R. Co. v. Jurey*, 111 U. S. 584; s. c. 16 Am. & Eng. R. R. Cas. 132; *Hall v. Railroad Cos.*, 13 Wall. 367; see especially latter part of language of Strong, J., above quoted; *Simpson v. Thompson*, L. R. 3 App. Cas. 279.

**The Effect of a Clause in a Bill of Lading giving the Carrier the Benefit of Insurance.**—(a). *Its Effect on Validity of Policy of Insurance.*—Assuming



that the right of subrogation is wholly independent of any contract between insurer and insured, there would seem to be no reason, in cases where the policy of insurance is taken out after the issuing of a bill of lading containing a clause giving the carrier the benefit of insurance, why the clause in the bill of lading should in any way invalidate the policy, in the absence of any fraudulent concealment of the terms of the bill of lading from the insurance company. The clause in the bill of lading prevents any equity of subrogation in favor of the insurance company and against the carrier from arising at the time the policy is issued; and if the right of subrogation does not arise at that time it never can arise; nor is the case different where the policy is issued before the bill of lading. By the express terms of the policy the insurer is absolutely liable to the insured in case of a loss within the terms of the policy, and this liability is wholly irrespective of any liability that may exist on the part of the carrier to the insured. The right of subrogation is a mere equitable right, and does not rest on contract. If the policy is prior to the bill of lading, this equity of subrogation must have its inception, if ever, at the time the insured contracts with the carrier, *i. e.*, at the time the bill of lading is issued. But the clause in the bill of lading giving the benefit of insurance to the carrier must prevent the arising of any equity of subrogation in favor of the insurer. Hence that clause in the bill of lading does not destroy an equity of subrogation that already exists, but simply prevents a right of subrogation from arising.

(b.) *Subrogation in Favor of Carrier.*—Does such a clause in the bill of lading give the carrier a right of subrogation against the insurer? This has never been squarely held, but there seems no doubt, on principle, that it does give the carrier this right. In *Phoenix Mut. Ins. Co. v. Erie & West. Transp. Co.*, 10 Biss. 18, 33, Dyer, J., says (speaking of such a clause): "And if the agreement be valid, I think it follows that on payment of the loss by the carrier, the insured would hold their claim against the insurer in trust for the carrier."

It has been held in several cases that such a clause prevents a recovery by an insurer who has paid, against the carrier. *British & Foreign Marine Ins. Co. v. South Colorado & Santa Fe R. R. Co.* (one of the principal cases *supra*); *Phoenix Mut. Ins. Co. v. Erie & West. Transp. Co.*, 10 Biss. 18; *Mercantile Ins. Co. v. Cables*, 20 N. Y. 178. In all these cases the policy was subsequent to the bill of lading; but it would seem, on principle, that this fact, although adverted to in *British & Foreign Mar. Ins. Co. v. Gulf, Colorado & Santa Fe R. R. Co.* (one of principal cases), was not material to the decision, for reasons given above in the discussion of the effect of the clause on the validity of policies of insurance.

*Stipulation in Policy for Subrogation against Carrier.*—When such a clause is contained in the policy it seems that a clause in the bill of lading giving the carrier the benefit of insurance would avoid the policy because it would be a breach of the stipulation in regard to subrogation, and in general by express provision of the policy the breach of a stipulation avoids the policy. *Carstairs v. Mechanics & Traders' Ins. Co.*, 16 Am. & Eng. R. R. Cas. 142, *vid.* also *Jackson Co. v. Boylston Ins. Co.* (one of principal cases). Could a recovery be had against the carrier in such a case? If the clause in the bill of lading giving the carrier the benefit of insurance is held to be a contract it would seem that the stipulation in the policy would clearly be of this contract, as it would deprive the carrier of the benefit of the insurance which was contracted for. Hence it would seem that in a suit against the carrier on the contract of carriage the carrier could recover his damages for the breach of this contract. What the damages would be would depend on the facts of the particular case, *i. e.*, the amount of insurance of which the carrier is thus deprived of the benefit, the amount of other insurance of which the carrier can get the benefit, etc.

**Payment of Loss Precedent to Right of Subrogation.**—A payment of the loss is necessary to perfect a right of subrogation. Therefore, in a suit by a shipper against a carrier to recover for the loss of goods, the fact that there is a clause in bill of lading giving carrier the benefit of insurance, and that the goods are insured, will furnish no defence to the carrier where the insurance money has not been paid. *Cin., H. & D. R. R. Co. v. Spratt*, 2 Duv. (Ky.) 4.

## INTERNATIONAL AND GREAT NORTHERN R. R. Co.

v.

NICHOLSON.

(61 *Texas Reports*, 550.)

A defendant who wishes to attack the jurisdiction of the court on the ground that the plaintiff has committed a fraud on such jurisdiction by placing a larger value on specific articles than was proper, the value of which was sued for, and that this was done to secure jurisdiction improperly, must plead that fact; the issue thus made should be submitted to the jury with the issues involved. On such an issue it does not necessarily follow that because the plaintiff in his petition claimed damages in excess of the minimum jurisdiction of the court, and recovered an amount less than such minimum jurisdiction, the amount claimed was fraudulently stated to secure jurisdiction.

When, on such an issue being submitted with the main case, the jury found for the plaintiff a sum in excess of the minimum jurisdiction of the court, the verdict must be regarded as including a finding in favor of the jurisdiction.

In a suit for damages against a common carrier for the loss of second-hand clothing belonging to the plaintiff, table furniture, and the like, having no special marketable value, and which were useful chiefly to the owner, it would seem that the measure of damages would be, not their loss at the place of intended delivery, but the value of such things to their owner; not a price suggested by his partiality for them, nor yet what he could sell them for, but the actual loss in money he would sustain by being deprived of such articles of domestic use.

In such cases it is only when the freight money has not been actually paid that the amount of it is to be deducted in estimating damages. When no sum was alleged or proved by the shipper, and no amount was specified in the bill of lading, it was not error in failing to charge on the subject.

In a suit to recover the value of second-hand clothing, it was not error to exclude the testimony of a witness as to the relative value of new and second-hand goods, when the witness stated that he was a dealer in new goods only and had no knowledge as an expert as to the value of second-hand clothing.

In such a suit a question asked a witness as to "what per cent was lost on goods by being used, or the value of second-hand goods," was properly excluded as too general.

**APPEAL** from Bexar. Tried below before the Hon. G. H. Noonan.

Suit by Martin Nicholson to recover the value of a bureau and contents, alleged to have been shipped from San Marcos to Galves-

ton and lost by defendant. The goods were valued in the petition at \$228.55. The defendant pleaded to the jurisdiction of the court, on the ground that the matter in controversy amounted to less than \$200, and that the plaintiff had falsely and fraudulently alleged the value to be \$228.55, exclusive of interest, for the purpose of giving the district court jurisdiction of the case. This plea was verified by affidavit.

Defendant also pleaded a general denial, and specially denied that the goods claimed were of the value alleged, or were of any value more than \$25; that it was unusual to ship such goods in a bureau, and that at the time of the shipment the defendant had no notice of the contents of the bureau.

The court submitted the plea to the jurisdiction to the jury at the same time with the other issues in the cause. The jury found the following verdict: "We, the jury, find for the plaintiff, and assess his damages at the sum of two hundred and twenty-eight dollars and fifty-five cents (\$228.55)." Judgment in favor of the plaintiff accordingly.

The errors assigned are evident from the opinion.

Defendant offered to prove by the witness Oppenheimer the relative value of new and second-hand goods, to which the counsel for plaintiff objected, because witness had testified that he was a dealer in new goods only, and the court sustained the objection and excluded the testimony.

The defendant also offered to prove by the witness Pettipain what percentage was lost on goods by being used, or the decreased value of second-hand goods, to which plaintiff objected, because the question was too general, and the court sustained the objection.

*J. H. McLeary* for appellant.

*Beneman & Bergström* for appellee.

**WILLIE, C. J.**—We do not think that any of the assignments of error relating to the ruling of the judge upon the plea to the jurisdiction of the court are well taken. There was nothing upon the face of the petition to show that the amount in controversy was placed at over \$200 for the purpose of improperly giving jurisdiction to the district court. On the contrary, the petition makes out a clear case of jurisdiction by alleging the goods lost to be worth \$228.55, and there is nothing in it to show that this was an overvaluation. In such a case, if a defendant wishes to show by extraneous proof that the value was falsely estimated at too much for the purpose of giving jurisdiction to the court, he must plead it, and then it becomes a question of fact to be submitted to the jury with the other issues in the cause. *Breen v. T. & P. R. R. Co.*, 44 Tex. 309.

The district judge in this cause submitted the question to the jury in a manner that cannot be complained of by the defendant.

FRAUD ON JURIS-  
DICTION MUST BE  
PLEADED.

for if there is any objection to this part of the charge it is owing to the fact that it is too favorable to the appellant. It did not follow as a matter of course that if the plaintiff claimed more than \$200 and recovered less, he was not entitled to sue in the district court. To oust the jurisdiction, it required further proof that the amount claimed was improperly overstated for the purpose of bringing the suit in that court. The charge of the court required a finding for the defendant, if the jury should think that the goods lost were not worth over \$200, no matter how honestly and properly, from facts known to plaintiff, he had acted in estimating them at a larger sum. Of this charge, if there was any complaint, the plaintiff was the party to make it, and it certainly is not subject to objection on the part of defendants. *Graham v. Roder*, 5 Tex. 141.

The jury found for the plaintiff in the sum of \$228.55, the exact amount claimed by him, and this verdict, in view of the charge of the court on the subject of jurisdiction, must be taken to have included a finding that the court had jurisdiction of the cause.

It is urged that the court should have charged the jury that the measure of damages was the value of the articles at their place of delivery less the cost of transportation. This is the general rule when goods are lost by a common carrier.

In the present case the value of the goods was proved, but it did not appear from the evidence that there was any difference between their value at the point of their shipment and at the place of their delivery. In fact, the lost articles seemed to be of such a character—viz., second-hand clothing, books, and table furniture; which had been used by the plaintiff—that they could not be said to have to him a value at one place different from what they possessed at another. He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner would furnish the proper rule upon which he should recover. Not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family.

But, be this as it may, the judge gave the charge as the appellant contends the law is, except that he did not state the place at which their market value was to be estimated, nor say anything about deducting the freight money which might be due upon them. The charge is not so definite in reference to the first matter as it should have been, but it is not

MEASURE OF  
DAMAGES  
ON  
HOUSEHOLD  
GOODS.

PLACE OF VALUE  
IN ESTIMATING  
DAMAGES.

clearly wrong upon its face, and in such cases it is the duty of the party not satisfied with the instruction to ask charges that will more specifically and clearly place the law before the jury. This the appellant failed to do in the present case.

It is only in cases where the freight money has not been paid that the amount of it is to be deducted in estimating the damages. Hutchinson on Carriers, § 769.

DEDUCTING  
FREIGHT MONEY  
FROM DAMAGES.

Here there was no proof whatever as to the amount agreed upon or as to whether or not it had been paid. The bill of lading left the amount blank, showing that no sum had been agreed upon by the parties. What the rate of charge in such cases was lay peculiarly within the knowledge of the defendant, and should have been proved by the company if it had not been paid. Without such proof the jury could not have deducted the freight, and there was no necessity for any charge upon that subject.

The court did not err in rejecting the testimony of Oppenheimer. He was introduced as an expert on the subject of second-hand goods, and failed to qualify himself as such by showing any means of knowing the value of such articles.

EXPERT AS TO  
VALUE.

Nor did the court err in excluding the question asked of Pettipain in reference to the deterioration in value of second-hand goods. The question was too general, and should have confined the witness to the deterioration from the use to which the lost goods had been subjected.

DETERIORATION  
IN VALUE.

The greater the length of time that goods have been used, or the severer the usage to which they have been subjected, the greater will be their deterioration in value. There can, therefore, be no general rule laid down as to the value of second-hand goods as compared to the value of those that are new; and any attempted rule on that subject would but tend to confuse the jury, or cause them to find upon a different state of facts from that presented to them.

Whilst the cost of the goods was proven there was also abundant testimony to show their value at the time of their loss. If there was any testimony to show that they were worth less than the value placed upon them by the plaintiff in his evidence, it did no more than produce a conflict which it was the province of the jury to pass upon, and which they did settle by their verdict.

There is no error in the judgment and it is affirmed.

**Affirmed.**

**Measure of Damages.**—Of course, in case of the destruction or loss of goods by a carrier the amount of damages recoverable is based directly on the value of the goods lost. This in the case of goods that have no market value is often very difficult to fix, especially where, as here, the value depends chiefly on the use to which they can be put by their owner. The rule for estimating the value in such cases as laid down in the principal case is undoubtedly correct. The damage recoverable is the actual loss in money the

owner would sustain by being deprived of articles adapted to the especial use for which the articles in question were adapted—not any fancy price the owner may have set upon them for special reasons, nor, on the other hand, what they could be sold for. *Fairfax v. New York Cent. & Hud. Riv. R. R. Co.*, 78 N. Y. 167; 3 *Suth. Dams.* 293, 294; *Mayne's Law of Damages* (3d ed.), 153, 154.

It is to be borne in mind, however, that in estimating the value according to the rule just suggested only those uses can be taken into consideration which are suggested by the nature of the goods themselves or of which the carrier had special notice. *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181. In that case the defendants had built a large floating boom derrick, fitted with machinery for raising sunken vessels, for a company which had become insolvent and had left it on their hands. The plaintiffs agreed to buy the hull of the derrick, which the defendants were to empty of machinery and deliver at a fixed time. The plaintiffs were coal-merchants, and the defendants, who knew of this, supposed that they intended to use the hull for storing coal, that being the most obvious use to which the hull could be put by a coal-merchant. As a matter of fact, the plaintiffs intended it for a totally different use. The defendants did not deliver the hull at the time contracted for, and the question was, what was the measure of damages for the delay? The damage to plaintiff if vessel was to have been used for storing coal would have been £420; the damages plaintiff actually suffered through loss of profit, etc., were actually much greater. It was held that plaintiff's recovery should be limited to £420, that loss being the natural consequence of the delay.

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## HOUSTON AND TEXAS CENTRAL R. R. Co.

v.

JACKSON.

(62 *Texas Reports*, 209.)

Where a common carrier fails to transport produce destined for market and received by him, in the condition in which he receives it and without unnecessary delay, the owner is entitled, among other elements of damage, by way of indemnity, to eight per cent interest on the value of the commodity from the time it should have been delivered at its market destination by the carrier. The fact that the owner was paying interest on a debt which the produce shipped was intended to satisfy neither adds to his right to recover interest for the delay nor enlarges the liability of the carrier.

APPEAL from Limestone. Tried below before the Hon. L. D. Bradley.

*Geo. Goldthwaite* and *L. G. Farrar* for appellant.

*A. C. Prendergast* for appellee.

STATON, J.—This action was brought by the appellee to recover from the appellant, a common carrier, damages alleged to have been incurred by the plaintiff in consequence of the failure of the appellant to transport with reasonable despatch a large num- FACTS.

ber of bales of cotton belivered to it by him to be carried to the city of Galveston, and there delivered to P. J. Willis & Bro., by whom it was to be sold, on arrival, for account of appellee.

The appellee was a cotton-buyer doing business at Kosse, on the line of appellant's railway, and the cotton as purchased was delivered to the appellant, who executed bills of lading therefor; but a large part of the cotton was not transported within a reasonable time after bills of lading were delivered, though ultimately taken to Galveston by the appellant.

The various items of damage are particularly set forth in the petition, and embraced loss in weight and decline in price during the delay, cotton destroyed by cattle, depreciation in the grade and value of the cotton while in the possession of the carrier by exposure to the weather, loss on pickings on arrival at Galveston, cost of picking; and he also claimed by way of damage a named sum paid to his commission merchant in Galveston as interest, which would not have accrued if his cotton had been transported within a reasonable time after bills of lading were executed.

The appellant answered by general demurrer and general denial.

The cause was tried without a jury and the conclusions of fact found by the court are as follows:

"First. The plaintiff was a merchant in the town of Kosse, in Limestone county, Texas, and the defendant a common carrier, with its line of road running through said town, as alleged in plaintiff's petition, in the years 1880 and 1881.

"Second. That the plaintiff purchased during the cotton season, beginning August 16, 1880, and ending March 16, 1881, five hundred and ninety-seven bales of cotton, for which defendant executed bills of lading as it was tendered for shipment at the time stated in plaintiff's exhibit 'B.'

"Third. That on all the cotton received by the defendant for shipment after September 14, 1880, there was a damage of \$5 per bale,—that is, on four hundred and seventy-six bales,—making an aggregate damage of \$2,380, and that one hundred and twenty-one bales of the five hundred and ninety-seven were shipped by the defendant promptly.

"Fourth. That in consequence of the failure of defendant to ship the four hundred and seventy-six bales within a reasonable time after bills of lading were executed therefor, the plaintiff sustained a further loss, by reason of a further decline in the market where the cotton was consigned, at Galveston, of \$1,483.32, as shown by plaintiff's exhibit 'B.'

"Fifth. That plaintiff suffered a further loss of \$63.21 in the way of pickings, and that said loss on said four hundred and seventy-six bales of cotton was due to the failure to ship said cotton after the bills of lading were executed therefor.

"Sixth. That two hundred and eighty-seven pounds of plain-

tiff's cotton, of the value of \$28.70, were destroyed by the cattle in the town of Kosse after the defendant executed bills of lading therefor.

"Seventh. That plaintiff was indebted to P. J. Willis & Bro., of Galveston, a considerable amount, which indebtedness the said cotton was intended to pay off, and that the plaintiff paid interest on said indebtedness at the rate of one per cent per month, or, in the aggregate, \$243.50 on said indebtedness from and after September 14, 1880.

"Eighth. That plaintiff paid to have about seventy-five bales of his four hundred and seventy-six bales picked, the sum of \$56.25: said pickings being rendered necessary by defendant's failure to ship said cotton within a reasonable time after bills of lading were executed therefor.

"Ninth. That of the said four hundred and seventy-six bales there was little or none thereof that was shipped in the order in which it was presented for shipment."

On these conclusions of fact the court below held, as matter of law, "that the several items of damage set forth above (in the conclusions of fact) are proper elements of damage, and under the facts of this case, and under the law regulating common carriers in this State, and I therefore render judgment in favor of plaintiffs against defendant for \$4,255.08, the aggregate amount of said items and costs of suit."

The appellant presents in the brief but two assignments of error. The first assignment relates to the item of interest paid to P. J. Willis & Bro., as stated in the seventh conclusion of fact, and it is urged that in the case made interest so paid is not a proper element of damage.

The statute of this State provides that "where common carriers receive goods for transportation into their warehouses or depots they shall forward them in the order in which they are received, the first received to be first forwarded, without giving the preference to one over another; and in case they shall fail to do so, they shall be liable, absolutely, for all losses occurring while the goods remain and for all damages occasioned or in any wise resulting from the delay; provided that the trip or voyage shall be considered as having commenced from the time of the signing of the bill of lading, and the liability of the common carrier shall attach, as at common law, from and after such signing." R. S. 283.

It is not denied that there was an unreasonable delay in transporting the cotton, for which damage was given at the rate of \$5 per bale, after the same was received by the appellant and bills of lading executed therefor; nor can it be denied that the cotton of other persons received by the railway company after that of the appellee was transported before his.

The terms of the statute are very broad, and evidently give the



right to recover damages on account of the common carrier's default, for any injury which in a legal sense can be said to be caused by that default.

The allowance of interest by way of damages has not in this State been confined to those cases in which interest is expressly given by statute.

It has been held that on a contract to deliver chattels, where the purchase-money has been paid, the highest price at any time between the day when the delivery should be made and the day of trial, with interest from the time when delivery should have been made, is the measure of damage for the breach of contract. *Calvit v. McFadden*, 13 Tex. 324. This rule was varied somewhat in *Masterson v. Goodlett*, 46 Tex. 403; but the right to interest for failure to deliver was recognized. Some qualification of the rule was also made as to the time when the value should be estimated in *Heilbronner v. Douglass*, 45 Tex. 406, but the rule as to allowance of interest was adhered to.

Interest has been allowed on the value of personal property converted. *Grimes v. Watkins*, 59 Tex. 140; *Hudson v. Wilkinson*, 61 Tex. 610.

Interest is allowed on breach of warranty in sale of land (*Turner v. Miller*, 42 Tex. 418; *Glenn v. Mathews*, 44 Tex. 400); and the same rule prevails on breach of warranty in sale of chattels unless varied by special circumstances. *Anderson v. Duffield*, 8 Tex. 237; *Scranton v. Tilley*, 16 Tex. 138; *Anding v. Perkins*, 29 Tex. 348.

For conversation or detention of money, interest has been allowed. *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811; *Close v. Fields*, 13 Tex. 623.

In *Fowler v. Davenport*, 21 Tex. 635, which was an action against a common carrier for failure to deliver articles which the carrier undertook to transport, it was said: "Upon contracts in which an agreement to pay interest is expressed, or can be implied, the interest is a legal incident, and it is held to be the duty of the court to instruct the jury to give interest. There it is a matter of law. In other cases it is a matter of fact, as damages in other cases, and may be allowed by the jury by analogy to interest. In such cases it is not an incident to the debt, but may be allowed under circumstances by way of mulct or punishment for some fraud, delinquency, or injustice of the debtor, or for some injury done by him to the creditor. *Renss. G. F. v. Reid*, 5 Cow. 614." This rule was followed and interest allowed in the case of *Wolfe v. Lacy*, 30 Tex. 350, which was a suit against a common carrier for injury done to cotton while in course of transportation.

The rule in reference to the non-delivery of goods by a common carrier is thus stated by Mr. Sedgwick: "As a general rule, where goods are intrusted to a carrier and they are not delivered accord-

ing to the contract, the value of the goods, *with interest thereon* from the day when they should have been delivered, is the measure of damages." 2 Sedgwick, 94.

The rule is thus stated in Sutherland on Damages, vol. 3, p. 238: "Interest is generally added, in this country, to the amount allowed as damages, on the generally accepted principles which govern the allowance of interest; it should be added as a necessary part of the indemnity the shipper or owner is entitled to for the loss or injury to his goods. But in some instances, under the influence of some early decisions and the reasons upon which they proceed, the allowance or withholding of interest is left to the discretion of the jury." The same rule is laid down by Mr. Field in the following language: "Where goods have been damaged in the course of transportation through the fault of the carrier, the rule of damages is the difference between the value of the goods as they are and the value as they should have been at the time and place where they were to be delivered according to the contract, and to which interest is to be added, but from which the freight should be deducted where it has not been advanced." Field's Law of Damages, sec. 378.

The principle announced by these authors is well sustained by the authorities referred to by them in the notes to the sections quoted.

The rule allowing interest in case of non-delivery and in cases in which goods are delivered by the carrier in a damaged condition depends on the same principle; and in either case has for its purpose the giving of compensation or indemnity to the injured party.

To give indemnity, the owner must be placed as near as may be in the same position he would have occupied had the carrier complied with his contract, which was that he would transport the cotton in the condition in which he received it without unnecessary delay.

Had it done so, the owner would, in all probability, within ten days from the time the cotton was delivered to the carrier, have received its value on sale. Of this he was entirely deprived during the time the cotton was permitted to remain at the carrier's depot, and nothing less than interest on the value of the cotton at its place of destination at such time as it should have been delivered will give compensation for the delay. The law estimates under our statute the value of the use of money on written contracts to pay money, to be eight per cent. per annum after the money becomes due; and if it be detained after it is due, the legal right of the creditor to have interest is fixed. This is deemed to be reasonable compensation for the money detained. In the case at bar, the appellee, by the wrongful act of the appellant, was prevented from realizing money which would have been realized but for the negli-

gence or delinquency of the carrier, and no sum less than the law deems reasonable compensation for the detention of a like sum of money as would have been received by the owner can be a just and proper indemnity to him for the deprivation of right which he suffered by the carrier's breach of contract.

The fact that the appellee may have been indebted to P. J. Willis & Bro., and that such debt was an interest-bearing debt, cannot add to the appellee's right to recover, nor can it enlarge the liability of the appellant.

The contract was not made with reference, as between the parties to it, to the pecuniary liabilities of the appellee.

There is no general prayer in the petition for interest, but there is a specific prayer for the exact sum paid as interest by the appellee while the cotton was detained by the appellant, and this asks interest at the rate of one per cent. per month during the time the cotton was detained. The court gave interest at that rate, and we are of the opinion that this was error; for the law, as before said, deems eight per cent. per annum a fair compensation for the use or detention of money in the absence of a contract fixing the value of such use or detention, and the same measure of damage, and not a greater, in cases like this, should be applied for the detention of that which would have produced money by sale on arrival at its contemplated destination.

In this case, from the nature of the transaction, the carrier may be presumed to have known that it was the intention of the owner, directly or indirectly, to convert the cotton into money.

We are of the opinion that, in cases like this, the true measure of damages will include interest, as matter of law, and upon this subject the following authorities in addition to those before cited may be profitably consulted: *Cowley v. Davidson*, 13 Minn. 93; *Spring v. Haskell*, 4 Allen, 113; *Cushing v. Wells, Fargo & Co.*, 98 Mass. 550; *Dana v. Fiedler*, 12 N. Y. 40; *Andrews v. Durant*, 18 N. Y. 502; *McCormick v. Penn. C. R. R. Co.*, 49 N. Y. 315; *Maguire v. Dinsmore*, 62 N. Y. 45; *Robinson et al. v. Merchants' D. T. Co.*, 45 Iowa, 475; *Chapman et al. v. Chicago & N. W. Ry. Co.*, 26 Wis. 304; *Whitney et al. v. Chicago & N. W. Ry. Co.*, 27 Wis. 348; *Mote v. Chicago & N. W. Ry. Co.*, 27 Iowa, 27; *Stondenmier v. Williamson*, 29 Ala. 569; *Pitsinowsky v. Beardsley, Hill & Co.*, 37 Iowa, 15; *Whitworth v. Hart*, 22 Ala. 360; *Parrott v. K. & N. Y. Ice Co.*, 46 N. Y. 369; *Mailler v. E. P. Line*, 61 N. Y. 316; 2 Sedgwick on Damages, 175, and authorities cited in note a.

Interest is a necessary item in the measure of damages in cases of this class, otherwise it is true, as was said in the case of *Dana v. Fiedler*, "this contradictory result follows, that, while an indemnity is professedly given, the law adopts such a mode of ascertaining

its amount that the longer a party is delayed in obtaining it the greater shall its inadequacy become."

Under the rule laid down in *Fowler v. Davenport and Wolfe v. Lacy*, the facts of this case justified the judge who tried the cause in giving interest as part of the damage to which the appellee was entitled.

If it appeared that the court below gave interest at the rate of one per cent per month by way of exemplary damages on account of gross negligence or delinquency of the appellant, were there a prayer for exemplary damages, under the facts shown by the record, it might not be necessary to disturb the judgment on the ground that it is excessive.

There is, however, no prayer for such relief, and it appears with reasonable certainty that the court was induced to allow that rate of interest because a like rate of interest was paid by the appellee. As before said, this fact ought not to influence the measure of damages; for the payment of such a rate of interest by the appellee was not the necessary or ordinary result of the breach of contract, and under the facts in proof could not have been within the contemplation of the parties at the time the contract was made.

If exemplary damages had been claimed in the petition, evidence might have been brought to rebut such state of facts as the appellee might have shown for the purpose of recovering damage of that character,—might possibly have brought evidence to show that the failure to comply with the contract was not wilful; that the delay in the performance of the contract was brought about by some cause which would relieve the carrier of the charge of gross neglect or wilful delinquency.

Such evidence for such a purpose might have been, if produced, sufficient to require the refusal of exemplary damages, which interest in excess of eight per cent must be considered, but of no value whatever for the purpose of avoiding the payment of such actual damage as resulted from the breach of contract.

The other assignment questions the sufficiency of the evidence to sustain the third conclusion of fact found by the court below.

There was evidence to sustain the finding of the court, and there was some evidence, mostly, if not entirely, testimony of experts, which tended to show that it was not likely that the cotton was injured to the extent found by the court.

The record, however, does not show, in this respect, a finding without sufficient evidence to support it, nor that there is even a preponderance of evidence against the finding, and in this respect, under such state of facts, the finding of the court below must be deemed conclusive of the question.

For the error noticed the judgment of the district court will be reversed and judgment will be here rendered in favor of the ap-

SUFFICIENCY OF  
EVIDENCE TO  
SUSTAIN FINDING.

pellee against the appellant for the sum of \$4,173.91, with interest thereon from October 3, 1883, at the rate of eight per cent per annum, together with the costs of the court below, and for the appellant for all costs incurred on this appeal; and it is accordingly so ordered.

Reversed and rendered.

(See note, *post.*)

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TEXAS PACIFIC R. R. Co.

v.

NICHOLSON *et al.*

(61 *Texas Reports*, 491.)

A parol contract by which a railway company agrees to receive cattle on its cars for transportation on a day certain, and which is violated by not having the cars as agreed on, may be made the basis of recovery against the company for all damages caused thereby. It cannot claim that its liability did not attach until the signing of a bill of lading for the cattle, which were delivered at a subsequent day, and after the contract had been violated. The liability of the company for damages was for a breach of contract, which made delivery of the cattle at the time specified impossible, and arts. 281, 282, and 283 of the Revised Statutes refer only to the liability of a common carrier after delivery of the thing to be transported and after signing a bill of lading therefor.

Such damages for breach of contract may be allowed as are naturally the result of the breach, or as may fairly be considered as having been within the contemplation of the parties at the time the contract was made.

When it is within the knowledge of a railway company that cattle which it has contracted through its agents to receive at a specified time and to transport to a particular destination are intended for sale on their arrival there, and the company, without fault of the owner of the cattle, violates the contract, and does not receive the cattle until a later period, whereby loss results, the difference between the value of the cattle at the place of destination when they should have arrived there under the contract, and when they did arrive there, is a measure of damage. If there is other deterioration due to the delay of the carrier, that must also be taken into consideration in estimating damage.

The rule which makes the measure of damages the difference between the value of goods at the place of shipment and their value at the point of destination applies to cases where the goods are never delivered at all at their ultimate destination, and not where there has been loss sustained by the failure to start them on time from the point of shipping.

When a railway company announces through its agent that it will not make a shipment at a time previously contracted for, a tender of the articles to be shipped at the time previously agreed on is thereby waived and rendered unnecessary to fix the liability of the company for resulting damages.

One will be bound by the contract made in his name by another, as his

agent, when such other has been accustomed to make similar contracts for him, as his agent, with his knowledge and approbation, and which have been recognized and ratified by him.

**APPEAL** from Tarrant. Tried below before the Hon. A. J. Hood.

Appellees brought suit to recover damages for a breach of contract in failing to receive and ship over appellant's railroad beef cattle from Colorado, Texas, to Chicago, Illinois. Plaintiffs charged that the defendant entered into a contract with them on the 12th day of May, 1882, by which it undertook to receive the cattle from plaintiffs on the 21st of May, 1882, at Colorado, and to furnish them necessary cars and transportation over its line to Chicago for market; that plaintiffs tendered the cattle on the 21st of May, 1882, and demanded of defendant that it receive them for shipment according to contract, and that defendant failed to receive them and perform the contract; that the shipment of the cattle was delayed until the 31st of May, 1882, and that by the breach of the contract plaintiffs sustained damages in the sum of \$3,750.

Answer by demurrer, general denial and special answer, setting up a special contract in writing, providing that plaintiff should give written notice of his claim for damages, as a condition precedent to his right of recovery. Verdict of the jury and judgment in favor of plaintiffs for the sum of \$3,618.51.

The court charged on the measure of damages as follows: "You will look to the following rules in estimating the damages: If there was before the receiving and shipping of the cattle unreasonable and negligent delay on the part of the defendant in receiving said cattle, then the plaintiffs should recover the difference, if any, between the market value of the cattle, if any, when they should have arrived at their destination, and when they did arrive, and also such damages, if any, as said cattle may have sustained by reason of delay in receiving and shipping; provided the testimony shows, and only in that event, that the shrinkage and deterioration in value, if any, was occasioned necessarily from the delay in receiving and shipping said cattle, and fairly entered into the contemplation of the parties to the contract at the time it was made."

A. S. Nicholson testified, in substance: That the defendant was a railway company on the 12th of May, 1882, and engaged in the business of carrying live-stock from Colorado, by its own and connecting lines, to Chicago. That plaintiffs had purchased a herd of beef cattle prior to 12th of May, 1882, and that they were running on the range, about seventy-five miles from Colorado, that being the nearest shipping-point for cattle, defendant having large pens there. That there were two hundred and fifty head of said cattle, worth \$40 or \$50 per head. That the range was good, being plenty of first-rate grass and water, while the grass and water were scarce at Colorado, and for that reason the plaintiffs wanted to have their

cattle shipped as soon as they reached Colorado. That on the said 12th of May, 1882, witness went to Mr. Bates, who was the regular stock agent at said place of Colorado, and told him that plaintiffs wanted to ship out their said cattle from Colorado on the 21st of the month, and told him that he wanted the defendant to have twelve cars ready, in which to ship plaintiffs' cattle, on said 21st of May, 1882. That Bates promised and agreed that if he would drive the cattle to Colorado on the 21st he would have the necessary cars to ship out said cattle promptly. That plaintiffs drove the cattle from their range and had them in the vicinity of Colorado on the 20th of May; that plaintiffs stopped the cattle three or four miles out of town, and upon the 21st, the day agreed on, notified the stock agent that the cattle had arrived and were ready for shipment. That the agent replied that he could not let me have the cars that day—that there were no cars on hand; but he thought witness could get them next day. That plaintiffs made same demand from day to day, until finally, on the 31st of May, 1882, defendant furnished the cars and shipped his cattle out to Chicago. During the time plaintiffs were waiting for the cars, from the 21st to the 31st of May, the cattle were held under close herd, there being no pens in which to confine them, and great scarcity of grass and water; they lost flesh and shrunk in weight, and deteriorated in condition to such an extent that they were damaged and their value decreased by at least \$5 per head; that would be a low estimate. All railroad men knew that cattle could not be held at Colorado for ten days at that time without damaging them.

Cross-examined: Witness said that Bates was the stock agent at Colorado at the time he made contract for furnishing cars; had been recognized as such by the defendant; his acts as stock agent ratified by defendant. Bates had been stock agent at Colorado for some time; had his office at their depot, and had frequently made contracts for furnishing cars and shipping cattle, and defendant had always recognized his acts in making such contracts. When I demanded my cars on the 21st, Moore had superseded Bates as stock agent; Moore is still stock agent. When I demanded the cars nobody questioned Bates's authority to make the contract with me. I never drove my cattle to the pens until the day they were shipped; held them out several miles from town. It was not customary to drive cattle up to the pens when any one tendered them. A man would have been foolish to drive them up to pens when he knew he could not get them in, and run the risk of getting them stamped by the engines. It was the custom there to hold cattle for shipment out of town, and it was generally considered a sufficient tender to notify the agent of their arrival. The agents at Colorado all knew that my cattle were there waiting shipment. At the time he notified the stock agent that the cattle had arrived and were ready for

shipment he "demanded the cars that had been agreed on, and that his said cattle be shipped."

The testimony was in some respects conflicting, and need not be stated at length.

**WILLIE, C. J.**—The assignments of error relied on in the brief of appellant's counsel complain of the action of the court in giving and refusing charges, and of the want of evidence to support the verdict of the jury. The first complaint against the charge is that it holds the railroad company liable as a common carrier of cattle upon a parol agreement to furnish cars, when its liability did not attach until the signing of the bill of lading.

Arts. 281, 282, and 283 of the Revised Statutes are cited as sustaining the views of appellant's counsel. These sections merely provide that the carriers' common-law liability as such shall commence from the time the bill of lading is signed; and that previous thereto they shall be liable only as warehousemen for goods placed in their depots or warehouses to be thereafter transported. They do not in terms or in effect exempt the carrier from such liabilities as he is subject to in common with all other persons, no matter what occupation they may pursue.

Here the effect was not to make the company liable as common carriers whilst the cattle were herded near Colorado City, but merely to subject it to a liability which an ordinary individual would be made to answer for under the same circumstances.

It is not necessary that a party should be a common carrier in order to make him responsible for violating a contract, nor does the fact that he is such by occupation relieve him from all accountability merely because he has not signed a bill of lading. When the bill is signed he becomes responsible as a common carrier, and must answer for all losses to the goods not resulting from the act of God or the public enemy, whether they occur in his warehouse where they are stored, or in the cars or vessels upon which they are being transported.

But a carrier may enter into a contract without a bill of lading, a part of which is to be performed before the goods are in a course of actual transportation by him, and in so far as such contract would be binding upon other persons it will be binding upon him also.

Had the appellees contracted for a sale of the cattle to a person living in Colorado City, the cattle to be received and delivered at that place on 21st May, the price to be their market value there on that day, and the delivery had been attempted, and the receipt of the cattle had been refused under like circumstances as attended the present transaction, the vendee would have been liable for all the damages caused by the delay. *Ganson v. Madigan*, 13 Wis.

LIABILITY OF  
RAILWAY COM-  
PANY BEFORE  
BILL OF LADING  
IS ISSUED.

PAROL CON-  
TRACT OF CAR-  
RIAGE.



67; *Allen v. Jarvis*, 20 Conn. 38; *Dunston v. McAndrew*, 44 N. Y. 72; 15 Wend. 493.

And so the railroad company is liable here for like damages caused by the detention of the cattle before they were actually received into their charge, that detention being in consequence of a refusal on their part to receive them according to an agreement previously made with the appellees.

The company could have recovered damages against the appellees had the latter failed to furnish the cattle at the time and place agreed on, and the company had been ready with their cars to receive them. The responsibilities for breach of contract cannot rest upon one of the parties whilst the other is to reap its benefits only.

The second objection to the charge relates to that portion of it which instructed the jury that in case there was unreasonable and negligent delay on the part of the defendant in receiving and shipping the cattle the plaintiffs should recover the difference, if any, between the market value of the cattle at the time they should have arrived at their point of destination and the time when they actually did arrive.

There is no objection made to that portion of the charge that allows as further damages the deterioration of the cattle whilst detained at Colorado City. It will not be necessary, therefore, for us to fortify by argument or authority a principle so well settled by both as not to be questioned in this appeal. *C. & A. R. R. Co. v. Erickson*, 91 Ill. 613; *Sturgeon v. Railroad Co.*, 65 Mo. 569; *Bridgman v. The Emily*, 18 Iowa, 509; *Smith v. Railroad Co.*, 12 Allen, 531.

Ordinarily the damages allowed the injured party upon breach of contract are such as will compensate him for the loss he has suffered. What will compensate in any given case must depend upon its peculiar circumstances. The rule now generally accepted is to allow such damages as must naturally result from a breach of the contract or as may fairly be considered to be within the contemplation of the parties at the time of making the agreement.

Applying this rule to the case of railroads who fail to deliver freight within a reasonable time, when it is within the knowledge of the company that it is transported for the purposes of sale at the place of delivery, the rule is that the difference between the value at such place at the time of delivering and at the time when it should have arrived, when the latter is the greater, forms one of the items of damages. *King v. Woodbridge*, 34 Vt. 565; *S. & M. R. R. Co. v. Henry*, 14 Ill. 156; *Cutting et al. v. G. T. Ry. Co.*, 13 Allen, 381.

If there is other deterioration due to the delay of the carrier, that must also be taken into consideration. *Bridgman v. Ship Emily*, 18 Iowa, 509; *Sturgeon v. Railway Co.*, 65 Mo. 569. The principle

DAMAGES FOR  
DETENTION OF  
CATTLE.

DELAY OF CAT-  
TLE; MEASURE  
OF DAMAGES.

which allows the difference in market value between the two periods of time as a measure of damages, of course finds its almost universal application in the case of common carriers, as they do the principal, if not the entire, transportation of the country. But it does not proceed from the extraordinary care required of them by the common law, or any other stringent rules applied to them, but is equally binding upon any party who undertakes to do for another a specific thing within a specified time.

A manufacturer who agrees to make and deliver by a specified time certain articles which he knows are to be sold for profit by the party ordering them must answer for delay to the same extent as the common carrier. And so, in the case already mentioned, of a delivery of the cattle at Colorado City to a party who had agreed to receive and pay the market price for them at a specified time, upon breach by the purchaser the same rule of damages would apply to him.

These instances are cited to show that there is nothing in the point made by appellant's counsel that the measure of damages does not apply when the delay occurred through the fault of the railroad company before they assumed the attitude of common carriers by signing a bill of lading. From the authorities cited by them, it seems to be claimed that the true measure of damages in the case of a common carrier is the difference between the value of the goods at the point of shipment and that at the point of destination; but this rule applies only in case the goods are never delivered at all, and not to a case where there is merely a delay in transporting them.

Had it been shown in this case that the freight money had not been paid, or that there were other means of transporting stock from Colorado City to Chicago, of which the appellees could have availed themselves, the rule of damages would have been modified; but neither of these facts appears in the case.

It is further urged that the court should have given the special charge asked by the defendant. This charge was to the effect that, to constitute a legal tender of the cattle, they must have been at Colorado City at the time agreed upon, and must then and there have been offered for shipment under such circumstances as to require no further act on the part of the plaintiffs to make the transfer complete. As to this it may be said that the proof showed that the cattle were tendered in the manner which custom had established for such tenders at that place, and that a tender in any other way would have been unwise and injurious under the circumstances. But be this as it may, no question of tender can be made in this case. This was rendered unnecessary by the conduct of the company's agent in declining to ship the cattle, which amounted in law to a waiver of the tender. He did not decline because of an improper tender. But because it was simply impossible to receive

the cattle for want of cars. A tender is rendered unnecessary where the party proposing it is informed in advance that it will be useless and will not be accepted. *Rudolph v. Wagner*, 36 Ala. 698; *Mattocks v. Young*, 66 Me. 459.

It is complained of the verdict that there was no proof that the person who contracted on behalf of the company to receive the cattle was authorized to make such a contract. We cannot concur in this statement. It was shown by Nicholson that this person (Barnes) had been stock agent at Colorado City for some length of time; had frequently made contracts of this kind for the shipment of cattle, which had always been ratified and adopted by the railroad company. He took orders for cars and received cattle at that point, and superintended the loading and shipping of cattle, and this was done with the knowledge and approbation of the appellant. This was proved even in stronger terms by another of the witnesses. It conflicted with the evidence of defendant's witnesses, but we cannot reverse upon such conflict, more especially as in this case the preponderance of testimony seems to be with the verdict. *Harrison v. M. & P. R. R. Co., Am. & Eng. R. R. Cas.* 382.

It is also objected to the verdict that it is excessive. The jury seem to have made a very accurate calculation, based upon the minimum losses proved or admitted in the evidence, going, perhaps, a few dollars above the exact amount. But they would have been justified under the evidence in finding a larger sum, and we do not think that the appellant has any cause of complaint at the amount assessed against it by the jury. There is no error in the judgment, and it is affirmed.

**Affirmed.**

(See note, *post.*)

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**ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY**

*v.*

**MUDFORD.**

(44 *Arkansas Reports*, 489.)

For the conversion or loss of goods, or total failure to deliver them to the consignee, a common carrier is liable only for their value and interest at six per cent per annum.

A common carrier is liable in damages for the negligent delay in the transportation of property; but the owner cannot, on account of unreasonable delay in the transportation and delivery, refuse to receive the goods and sue as for a conversion. He can claim only the damages sustained by the delay.

APPEAL from Miller Circuit Court.  
*Dodge & Johnson* for appellant.  
*Scott & Jones* for appellee.

SMITH, J.—Mudford filed the following complaint against the railway company, viz.:

FACTS. “The plaintiff alleges that heretofore, on the eighth day of February, 1881, said defendant was a common carrier for hire, from Texarkana, Miller County, Arkansas, to Cairo, in the State of Illinois, and on said day received from plaintiff at said Texarkana one box of gin-sharpening machines, for transportation to said Cairo, there to be delivered to a connecting carrier, to be forwarded to Goble Bros. & Co. at Cincinnati, Ohio.

“Said box of gin-sharpening machines was of the value of nine hundred and fifty dollars, and was so to be, by defendant, as a carrier for a reward there agreed upon and paid to defendant by plaintiff, carried and delivered to said connecting carrier within a reasonable time.

“Said plaintiff alleges that three days is a reasonable time in which said machines should have been transferred from Texarkana to Cairo, Illinois, aforesaid, yet the defendant so negligently misbehaved in regard to the same in its calling as carrier for hire that it failed and neglected to deliver the said box to a connecting carrier for transportation to Goble Bros. & Co., aforesaid, until the sixteenth day of May, 1881, to the plaintiff's damage in the sum of one thousand dollars, wherefore plaintiff prays judgment,” etc.

Defendant filed the following answer:

“The defendant admits that there was some delay in the transportation of said goods and the delivery of the same to a connecting carrier.

“It denies that said goods are of the value of nine hundred dollars, or that plaintiff was damaged, as alleged, by said delay, as alleged.”

The only testimony in the case was that given by the plaintiff himself as follows:

“I am the plaintiff. I shipped the gin-sharpeners to Cincinnati by the defendant's road. There were forty-seven (47) of them. They cost me five dollars apiece. They were defective, and were shipped to Cincinnati for repairs. Machines were worth and sold for twenty-five dollars apiece at the time. It would have cost me one dollar apiece to send them to Cincinnati and back for repairs. I was the patentee of the machine. I was forced to get other machines by the delay. They were shipped in February and did not arrive at Cincinnati until May sixteenth, almost three months after they were shipped. The station agent of the defendant at Texarkana notified me that they were lost, and asked me to make a bill

of them. I waited four or five weeks, and then ordered other machines. The time for using the machines was in the spring, and they would not sell so readily in May, on account of the lateness of the season. When they were found, the machines were in the same condition as when they were shipped. They were worth five dollars when they were shipped, and were worth that when found. I suppose I made as many as twenty trips into Texarkana to ask about them. I lived five miles away. It would, with ordinary diligence, require half a day to make a trip. My time was worth two dollars and a half per day. I refused to receive the machines when found."

Upon a trial before a jury the sum of \$550 was awarded plaintiff. Defendant's motion for a new trial, alleging misdirection of the jury, and that the verdict was contrary to the evidence and excessive in amount, was overruled.

It is obvious that the verdict is grossly in excess of any damages that the plaintiff could have possibly sustained, and that it cannot stand. If the railway company had converted these machines to its own use, or had lost them, or for any other cause had wholly failed to deliver them to the connecting carrier, the measure of damages would have been their value, \$235, with interest at the rate of six per cent per annum. How, then, could the plaintiff be damaged in more than double this sum, when the goods were delivered in less than three months, and in the mean time had suffered no depreciation in market value, and no intrinsic deterioration?

COMMON CARRIER: DAMAGES FOR DELAY OF FREIGHT.

A common carrier is liable in damages for a negligent delay in the transportation of property. But the owner cannot, on account of unreasonable delay in the carriage and delivery, refuse to receive the goods and sue as for a conversion. *Hutchinson on Carriers*, sec. 775; 3 *Sutherland on Damages*, 215; *Scovill v. Griffith*, 12 N. Y. 509.

SAME.

Consequently when the defendant delivered the machines in good order to the connecting line at Cairo, it had performed its undertaking to carry, and was not responsible for their value as in case of a destruction or conversion. And the only claim which the plaintiff could have had against it was for the loss he had sustained by reason of the delay.

Now the complaint does not aver any special damages; that is, any damages which are not the necessary consequence of the delay, or which could not have been reasonably anticipated by the parties when the shipment was made. Hence none are recoverable except such as necessarily result from the injury complained of. 2 *Gr. Ev.*, sec. 254; *Sedgwick on Damages*, 575.

For the breach of every contract the law implies that some damage has resulted. Yet if a party seeks to recover more than nominal damages, there must be evidence of

DAMAGES FOR BREACH OF CONTRACT.

an actual, substantial loss, unless the contract itself furnishes a guide to the measurement of damages. *Adams Express Co. v. Egbert*, 36 Pa. St. 360.

The answer admitted that the delay was inexcusable, but no testimony was adduced to show that the plaintiff had sustained any pecuniary loss beyond the trouble and inconvenience of making inquiries for the machines.

Reversed and remanded for a new trial.

**Measure of Damages for Delay in Transporting Goods.**—When the goods to be transported have a market value the measure of damages for delay in transporting them is the difference between the market value of the goods at the place to which they were shipped at the time they should have arrived and their market value at that place when they do arrive, with interest from the former date, less freight charges, if unpaid. That the decline in the market price may be recovered in damages, see *Sherman v. Hudson Riv. R. R. Co.*, 64 N. Y. 254; *Ward v. New York Central R. R. Co.*, 47 N. Y. 39; *Griffen v. Colver*, 16 N. Y. 489; *Scott v. Boston & New Orleans Steamship Co.*, 106 Mass. 468; *Smith v. N. H., etc., R. R. Co.*, 12 Allen, 531; *Ingledeu v. Northern R. R. Co.*, 7 Gray, 88; *Illinois Cent. R. R. Co. v. Cobb*, 64 Ill. 128; *Sisson v. Cleveland & Toledo R. R. Co.*, 14 Mich. 489; *Faulkner v. South P. R. R. Co.*, 51 Mo. 311; *Devreaux v. Buckley*, 34 Oh. St. 16; *Peet v. Chicago & N. W. R. R. Co.*, 20 Wis. 594; *Newell v. Smith*, 49 Vt. 255.

That interest may be recovered, see *Cushing v. Wells, Fargo & Co.*, 98 Mass. 550; *Sherman v. Wells*, 28 Barb. 403; *Erie R. R. Co. v. Lockwood*, 28 Ohio St. 358; *Spring v. Allen*, 4 Allen, 112; *Blumenthal v. Brainerd*, 38 Vt. 403; *Hand v. Burnes*, 4 Whart. 204; *Whitney v. Chicago & N. W. R. R. Co.*, 26 Wis. 223; *Robinson v. Merchants' Desp. Transp. Co.*, 45 Iowa, 570; *Cowley v. Davidson*, 13 Minn. 92.

Such damages are immediate and proximate, and may be recovered without special averment of damage, 1 *Suth. Damages*, 763.

**Special Damage.**—In a recent English case a manufacturer of shoes shipped a consignment of shoes by a carrier to fill a time contract. By reason of the negligent delay of the carrier, the goods were not delivered in time to fill their contract, and they were accordingly refused. The goods were at once sold in the market at a price much less than the contract price. It was sought to recover from the carrier the difference between the contract price and the price at which the goods were sold; but it was *held* that, in the absence of notice to the defendants of the contract at the time the goods were shipped, the measure of damage was as given above, *i.e.*, depreciation in market price and interest. *Home v. Midland Ry. Co.*, L. R. 7 C. P. 583 & L. R. 8 C. P. 131.

**Special Damages where Special Circumstances are made known to the Carrier.**—Where special circumstances increasing the damages were made known to the carrier at the time the contract for carriage was made, such increased damage may be recovered of the carrier. Thus, where plaintiff had contracted for the sale of a lot of wool at a fixed price to be delivered in Boston at a fixed date, and plaintiff delivered the wool to the agent of the carrier, informing him of the facts at the time, and by the negligent delay of the carrier the goods arrived too late for the sale, it was *held* that plaintiff was entitled to recover for the loss of the profit he would have made by the sale. *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455. See also *Sisson v. Cleveland & Toledo R. R. Co.*, 14 Mich. 489; *Gee v. Lancashire & Yorkshire Ry. Co.*, 6 H. & N. 211.

**Special Contract not Necessary to hold Carrier to Increased Measure of**

**Damages.**—It has been intimated that mere notice to the carrier of facts which will increase the damages in case of a breach of contract is not sufficient to render the carrier liable for increased damages. That the fact that the carrier is obliged to receive and carry all goods that are offered for carriage rebuts the presumption that the contract was made with a view to the increased damage which will result in case of loss, and hence that unless it be proved that the increased measure of damages was actually contracted for only the ordinary measure of damages can be recovered. *Home v. Midland Ry. Co.*, L. R. 8 C. P. 131; see remarks of Kelly, p. 136; those of Martin, B., p. 139; and those of Blackburn, J., p. 141.

The weight of authority, however, seems to be against this view; see *Simpson v. London & Northwestern Ry. Co.*, L. R. 1 Q. B. D. 274; and cases above cited. When the carrier is informed of special circumstances increasing the damages in case of a breach of contract he may, it would seem, demand a reasonable compensation beyond the ordinary rates for carriage. See remarks of Kelly, C. B., p. 137, in *Home v. Midland Ry. Co.*, L. R. 8 C. P. 131. See also opinion of Pollock, C. B., in *Gee v. Lancashire & Yorkshire Ry. Co.*, 6 H. & N. 211, 217.

## INTERNATIONAL AND GREAT NORTHERN R. R. Co.

v.

UNDERWOOD.

(62 *Texas Reports*, 21.)

Where a written contract with a carrier required that the carrier should be notified in writing of the extent of damage sustained by freight, *in transitu*, before suing therefor, and there was evidence on the trial tending to show that compliance with this stipulation was waived by the carrier, whose agent, after examining into the alleged injury, agreed to pay a fixed sum in satisfaction of such damage, a verdict against the carrier for such agreed sum was not disturbed.

APPEAL from Bexar. Tried below before the Hon. Geo. H. Noonan :

Suit begun in justice court upon the following account :

*Railroad Company Dr. to N. Underwood :*

1881. To two mares killed while on the defendant's railroad, valued  
at \$50 each ..... \$100 00

Verdict was rendered for the plaintiff for \$100. The appellant removed the case to district court by appeal, where a judgment for the same amount was rendered against him.

The stock in question was shipped from a point in the State of Texas to a point without the State, upon a written contract, and the plaintiff agreed therein, in consideration of a reduced rate of freight specified, to give the defendant written notice of his claim for damages to some officer or agent of the defendant before removing the stock from the place of delivery, as a condition precedent to

the bringing of any suit for the recovery of damage; the plaintiff did not give such written notice.

The plaintiff testified that he shipped the horses from San Antonio to Corinth, Mississippi, and he discovered at Texarkana that the two mares in question had been injured by getting their legs through the car. The contract on which they were shipped was put in evidence by defendant, and contained the clause referred to in the first assignment of errors, and appellee testified that no written notice was given.

Appellee testified on re-examination, over defendant's objection, that he left one injured mare with the station agent at Texarkana, and it was agreed between them that the damages should be \$100; that he at once notified him of the injury, and the agreement that the \$100 should be paid was made.

*Mason & Carr* for appellant.

No briefs on file for appellee.

WEST, A. J.—A large number of cases can no doubt be found to the effect that a common carrier may lawfully, by stipulation in writing, require the party seeking to recover for injuries sustained to give him notice in writing as to the nature of such damage, at the time of its occurrence.

NOTICE OF CLAIM  
BEFORE SUIT:  
WAIVER.

In a carefully prepared opinion, Presiding Judge Walker of the commission of appeals reviews to some extent the cases bearing on this question. The authorities referred to, and to some extent discussed by him in that case, seem to sustain the views therein expressed. As to the correctness of his conclusions, it is not necessary in this case to determine, and on that point we express no opinion. The case referred to (*Missouri Pac. Ry. Co. v. Harris*) is to be found in *White & Wilson's "Civil Cases of the Court of Appeals,"* p. 730, sec. 1257. See, also, on the same subject, *Redfield on "Carriers and other Bailments,"* where this question is discussed at some length, and some of the more important cases examined. Chapters 12 and 13.

In the case now under consideration, while the written contract offered in evidence required notice of the damage to be given in writing, there was considerable proof adduced going to show that the provision in the contract to this effect was in this case waived by the parties to it.

There is testimony which shows that the agent of appellant was, at the time of the occurrence, at once notified of the extent of the damage sustained, and that he then, after looking into the matter, agreed with appellee to pay him a fixed sum in satisfaction of his claim.

The evidence introduced on this point, as it appears from the statement of facts, which by order of the court was filed after the



court adjourned, was objected to. What the ground of objection to it was, does not appear in the record. The objection appears to be general in its character, and is inserted in the statement of facts; and even if it had been special, there being no bill of exceptions filed during term time to its admission, it could not now be considered. *Howard v. Mayor of Houston*, 59 Tex. 78; *Blum v. Schram & Co.*, 58 Tex. 524; *Sabine & E. Tex. R. Co. v. Joachimi*, 58 Tex. 452, s. c., 11 Am. & Eng. R. R. Cas. 539, R. S. art. 1363.

Even, however, if such bill of exceptions had been prepared and saved in time, and we were to consider it, it does not affirmatively appear from the record that the notice of injury which was given by the appellee was not then considered by all the parties as sufficient. It plainly appears from the evidence that the appellant at the time considered the notice given, whatever it was, as sufficient, and agreed with appellee upon the sum to be paid, the amount being the same that was found by the judgment of the court to be the proper amount.

This case has been twice tried, with the same result on each trial, and as the record discloses no material error, the judgment is affirmed.

**Affirmed.**

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**KENNEDY BROTHERS**

*v.*

**MOBILE AND GIRARD R. R. Co.**

(74 *Alabama Reports*, 430.)

When a railroad company receives goods for transportation, safely transports them to the point of destination, informs the consignee of their arrival, and affords him a reasonable opportunity to remove them, its duty and liability as a common carrier are at end; and if the goods are then left in its custody, its liability for a subsequent loss or damage is that of a warehouseman only.

In an action against a railroad company as a common carrier, for the loss of goods, the complaint being in the form prescribed by the Code, a recovery cannot be had on proof of a loss which occurred after the defendant's duty and liability as a carrier had terminated, and while the goods had been left in its custody as a warehouseman.

**APPEAL** from the Circuit Court of Pike.

*Gardner & Wiley* for appellants.

*Jas. T. Norman* for appellees.

21 A. & E. R. Cas.—10

**BRICKELL, C. J.**—The complaint contains a single count, in the form prescribed by the Code, claiming damages of the defendant for a failure to deliver certain goods, which it had received as a common carrier for transportation and delivery to the consignees of the plaintiffs, at the city of Troy in this State. The uncontroverted facts shown in evidence on the trial in the Circuit Court are, that the goods were safely transported to Troy, the point of destination, and the consignees informed of their arrival, they giving a receipt for them, and making payment of the freight; but, not having a place to store them, the goods were left in the care and custody of the defendant; and if any loss occurred, it occurred after the taking of the receipt and the payment of freight, and after the request that they should remain in the custody of the defendant.

A complaint, like a declaration at common law, should state the facts necessary to constitute the cause of action, clearly and intelligibly; and the evidence in support of the plaintiff's right of recovery must correspond to its averments. There can be no recovery upon a cause of action, however meritorious it may be, or however satisfactorily proved, that is in substance variant from that which is pleaded by the plaintiff.—1 Chit. Pl. 2711. It is well settled that when a common carrier safely transports goods to the point of destination, informs the consignee of their arrival, and affords him reasonable opportunity for their removal, his relation, duty, and liability as a carrier terminate; and if subsequently the goods remain in his custody, his liability is that of a bailee for deposit or storage,—as usually designated, that of a warehouseman. He is bound only to common care and diligence, and liable only for the want of such care and diligence. *Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209; *Mobile & Girard R. R. Co. v. Prewitt*, 46 Ala. 63; *Hutchinson on Carriers*, § 356. The concurrence of all these facts may not be necessary to the termination of the carrier's duty and liability; we state them now, because in this case the evidence of their concurrence is undisputed. Having kept and performed its contract and duty as to the transportation of the goods,—having carried them to the point of destination, informed the consignees of their arrival, afforded opportunity for their removal, and subsequently retaining custody of them to await the convenience of the consignees,—it would be manifestly unjust if the defendant could be charged as an insurer; charged with the extraordinary liability of a carrier for a loss subsequently occurring. That duty and liability had terminated; and if the evidence tends to show a loss of the goods, and a consequent liability upon the defendant, it is variant from the allegations of the complaint; it is not because of a violation of the duty therein stated that a liability arises. In no event could the plaintiff recover under this form of complaint; and if there is

TERMINATION OF  
LIABILITY  
OF  
CARRIER.

error in the giving or refusal of the instructions, to which exceptions were taken, the error is without injury, and is not matter for reversal.

Affirmed.

**When a Railroad's Liability as a Common Carrier of Freight Ceases.**—In some States it is held that the railroad's liability as common carrier does not cease upon the arrival of goods at the station to which they were sent until the consignee has had notice of their arrival and a reasonable opportunity to remove them. This is held in Vermont, New Hampshire, Wisconsin, Kentucky, New Jersey, Louisiana, Ohio, and Kansas. *Ouimit v. Henshaw*, 35 Vt. 604; *Blumenthal v. Brainerd*, 38 Vt. 402; *Wood v. Crocker*, 18 Wis. 345; *Winslow v. Vermont & Mass. R. R. Co.*, 42 Vt. 700; *Lemke v. Chicago, Mil. & St. Paul R. R. Co.*, 39 Wis. 449; *Jeffersonville, etc., R. R. Co. v. Cleveland*, 2 Bush. (Ky.) 468; *Morris & Essex R. R. Co. v. Ayres*, 5 Dutch. 898; *Maignan v. New Orleans, Jackson & Great Northern R. R. Co.*, 24 La. Ann. 838; *Hirsch v. The Quaker City*, 2 Disney, 144; *L. L. & G. R. R. Co. v. Maria*, 16 Kan. 388.

In Massachusetts, a different rule is established. It is there held that the liability of the railroad as a common carrier ceased as soon as the goods arrived at their destination, and are removed from the cars to a place of safety. *Thomas v. Boston, etc., R. R. Co.*, 10 Metc. (Mass.) 472; *Norway Plains Co. v. Boston & Maine R. R. Co.*, 1 Gray, 263; *Stowe v. New York, Boston & Providence R. R. Co.*, 113 Mass. 521; *Barton v. Eldredge*, 100 Mass. 455. The carrier's liability is then merely that of a warehouseman. (See case above cited.)

The Massachusetts rule has been followed or adopted in North Carolina, Pennsylvania, Iowa, California, Indiana, Illinois, and Georgia. *Jackson & Sacramento Valley R. R. Co.*, 23 Cal. 268; *Southwestern R. R. Co. v. Felder*, 46 Ga. 433; *Chic. & Alton R. R. Co. v. Scott*, 42 Ill. 132; *Cincinnati & Chicago Air Line R. R. Co. v. McCoal*, 26 Ind. 140; *Neal v. Wilmington & Weldon R. R. Co.*, 8 Jones (N. C.) L. 482; *McCarty v. New York & Erie*, 30 Pa. St. 247; *Mohr v. Chicago & Northwestern R. R. Co.*, 40 Iowa, 579.

In States where the carrier is in general required to give notice, he need not give notice in the following cases: (a) Where the consignee knows that the goods have arrived and are ready to be delivered. *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505; *Pinney v. First Division of St. Paul & Pacific R. R. Co.*, 19 Minn. 251. (b) Where the carrier is ignorant of the address of consignee, and is unable after due inquiry, to ascertain the same. *Pelton v. Rensselaer & Saratoga R. R. Co.*, 54 N. Y. 214.

In such cases the carriers' liability as common carriers ceases after a reasonable time for the removal of the goods has elapsed.

On this general subject, see note to *Wilson v. S. P. R. R. Co.*, 7 Am. & Eng. R. R. Cas. 400 p. 404.

The case of *Alabama & Tenn. R. R. Co. v. Kidd*, 35 Ala. 209, was supposed to lay down the rule in accordance with the Massachusetts cases; but see principal case.

WILSON, Appellant,

v.

NEW YORK CENTRAL AND HUDSON RIVER R. R. Co.

(97 *New York Reports*, 87.)

Plaintiff shipped two horses by defendant's road under a contract by which he released the company from liability for damages resulting from the negligence of its servants or which should be occasioned by the insecurity of its cars. The horses were transported in a grain-car, which was out of repair, and, while sufficient for the use for which it was intended, unsafe for the transportation of live-stock. In consequence of such defect one of the horses was injured. In an action to recover damages, it did not appear but that other safe and secure cars were provided by defendant and were on hand ready for use, so that the injury might have been caused by carelessness on the part of its servants in selecting an insecure car. *Held*, that the only negligence shown was that of defendant's servants, from the consequences of which it was released by the contract; and that plaintiff was not entitled to recover.

It seems that the language of such a release, where it is included in the same clause and connected with releases from the consequences of other causes of injury which could only occur during the process of shipment and transportation, is satisfied by limiting it to the negligence of defendant's servants in and about the transportation, and does not extend to a negligent omission to furnish proper cars.

APPEAL from judgment of the General Term of the Supreme Court, in the Third Judicial Department, entered upon an order made at the June Term, 1882, which affirmed a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 27 Hun, 149.)

The nature of the action and the material facts are stated in the opinion.

*L. W. Russell* for appellant.

*D. M. K. Johnson* for respondent.

FINCH, J.—This action was brought to recover damages for injuries to a horse, resulting from negligence of the defendant company in its transportation. The shipping contract contained this clause: "Whereas the New York Central & Hudson River R. R. Co. transport live-stock, either by the head or by the car-load, at reduced prices, upon the shipper assuming certain risks, as specified below: Now, in consideration that said company will transport at said reduced prices two (2) horses, Allen Wilson, Ogdensburg, N. Y., they are hereby released from all liabilities for injuries which the animals, or either of them, may receive in consequence of any of them being wild, vicious, unruly, weak, escaping, or maiming themselves or each other; or in consequence of

heat, suffocation, or other ill effects of being crowded either upon cars or in yards; or on account of being injured by the burning of hay, straw, or any other material used for feeding the stock; or in any other way, including the negligence of said company's servants, and also for all loss or damage which may be sustained by reason of any delay in the loading, transportation, or delivery of them; or in consequence of insecurity of the cars." The door of the car in which the animal was carried was shown to have been out of repair and unsafe when used to confine and protect live-stock. It appears to have been an iron grain-car, and possibly might have been used to carry grain or dead freight and been quite sufficient for the purpose; indeed, the same car was afterward used to carry lumber, and passed by an inspector as suitable and sufficient for that purpose. So that the negligence which caused the injury may have been either that of the company's servants in selecting and using a car for the transportation of the horses which was unsafe for that purpose, when other and sufficient cars were provided and might have been used, or the negligence of the company preceding the act of transportation in failing to furnish sufficient and suitable cars for the carrying of live-stock. The defence rested upon two provisions of the contract signed by the shipper. One of them released the company from liability for any damage resulting from the negligence of the company's servants; and the other from damage occasioned by the insecurity of the cars. The language of the first provision is amply satisfied by limiting it to the negligence of the company's servants in and about the particular act of transportation, and without extending it to a prior negligence of the company in failing to furnish proper cars, although such would have been, perhaps, necessarily, a fault of the company's servants. This construction is justified by reference to other and connected provisions of the contract. The release is from "all liabilities for injuries which the animals, or either of them, may receive, in consequence of any of them being wild, vicious, unruly, weak, escaping, or maiming themselves or each other; or in consequence of heat, suffocation, or other ill effects of being crowded either upon cars or in yards; or on account of being injured by the burning of hay, straw, or any other material used for feeding the stock; or in any other way, including the negligence of said company's servants." The causes of injury specifically mentioned are such as could only occur during the process of the shipment and transportation, and the negligence of the corporate servants included in the recital naturally refers and is limited to a negligence occurring in the same process. If, therefore, the injury arose from a careless selection of an insecure car by the servants making up the train, when safe cars in abundance were provided by the company, or from any other negligence of such servants during the process

of transportation, then the company is freed from liability by force of the clause in question.

But, it is said, the company, as distinguished from its servants, was itself negligent in not furnishing a proper car, and from that negligence there are no words of release in express terms, as were required in *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370; s. c., 9 Am. & Eng. R. R. Cas. 103. There was no proof of any such corporate negligence. It is not shown that the company did not furnish a sufficient number of safe and suitable cars for the transportation of horses, or that such cars were not at hand and ready for use when the shipment was made. The car in question SUFFICIENCY OF CARS. was a grain-car and might have been, and probably was, sufficient and safe for the uses to which the company expected and intended it should be put. We cannot say that its mere presence upon the rails of the company was a negligent act, when for its appropriate uses it appears to have been sufficiently safe; all that we can say is that it ought not to have been used to carry horses, in its existing condition; but if there was negligence in that, it was the negligence of servants who made up the train. So far as the company was concerned, it was guilty only of a breach of contract to carry safely, and from that it was released by the provision discharging it from responsibility for an injury arising "from the insecurity of the cars." There was no proof of any negligence of the company as distinguished from and outside of the negligence of its servants in and about the process of transportation; on the contrary, the latter only was alleged in the complaint, for the negligence there asserted was that "said defendant negligently and carelessly placed said horses in an unsafe and rotten car, and transported and carried said horses without proper and necessary care and attention." The placing in the unsafe car and the lack of care were acts of the servants in and about the process of transportation. There is neither allegation nor proof that the company had failed to supply sufficient and suitable cars for the transportation of horses, so that its servants were driven by its fault to the selection of the car used. The two clauses of the contract, therefore, taken together constituted a defence.

The judgment should be affirmed.

All concur, except Danforth, J., absent.

Judgment affirmed.

**New York Law as to Clauses in Bills of Lading Exempting Carriers from Liability for Loss occurring through Negligence.**—It is settled that a clause in a bill of lading by which a common carrier is exempted from liability for loss or injury caused by negligence of said carrier or its servants is valid. *Nelson v. Hudson River R. R. Co.*, 48 N. Y. 498.

But a clause in a bill of lading exempting a carrier from losses resulting from certain specified causes will not exempt it from liability for damage or injury resulting from one of the causes specified, where the damage or injury

was caused by negligence on the part of the carrier or its agents, unless the bill of lading expressly provides that the exemption shall extend to losses caused by the negligence of the carrier or its agents.

Thus, where the bill of lading provided that the carrier should be released from liability "from damage or loss to any article from or by fire or explosion of any kind," it was held that the exemption did not extend to loss from a fire resulting from the negligence of the carrier. *Steinweg v. Erie Ry.* 43 N. Y. 123. The following cases illustrate the same principle: *Condict v. Grand Trunk R. R. Co.*, 54 N. Y. 500; *Lamb v. Camden & Amboy R. R. Co.*, 46 N. Y. 271; *Rawson v. Holland*, 59 N. Y. 611; *Nicholas v. New York Central, etc.*, R. R. Co., 89 N. Y. 370; s. c., 9 Am. & Eng. R. R. Cas. 103; *Holsapple v. Rome, W. & O. R. R. Co.*, 86 N. Y. 275; 3 Am. & Eng. R. R. Cas. 487.

Similarly, it was held that a clause in a bill of lading made by an express company, which limited the recovery in case of loss to \$50, where the value of the goods was not disclosed, did not apply to the case of a loss occurring through the negligence of the carrier. *Magnin v. Dinsmore*, 56 N. Y. 168. See *Westcott v. Fargo*, 61 N. Y. 542.

The principle on which these cases were decided seems to be that a clause limiting the liability of a carrier for injury resulting from its own negligence or that of its servants is so unreasonable that a clause in the bill of lading should not be held to give this extraordinary exemption if any other construction can be given it.

**General Words Not Enough to Exempt for Negligence.**—But the New York courts have gone further beyond this principle, and have held that general words are insufficient, though clearly covering the loss through the negligence of the carrier or its servants. This was squarely held in *Mynard v. Syracuse, Binghamton & N. Y. R. R. Co.*, 71 N. Y. 180. In that case the bill of lading provided that the carrier was to be released "from all claims, demands, and liabilities of every kind and character whatsoever, for or on account of or connected with any damage or injury to or the loss of said stock, or any portion thereof, from any cause arising," and it was held that this clause would not exempt the carrier from liability for a loss caused by negligence. The decision in this case is explained by *Andrews, Ch. J.*, in *Nicholas v. New York Cent., etc.*, R. R., 89 N. Y. 370; s. c., 9 Am. & Eng. R. R. Cas. 103, who said:

"The words 'from whatsoever cause arising' were as broad and comprehensive as possible. The court, however, refused to construe them as covering a loss arising from negligence of the carrier, not, as I understand the decision, because the words, in their ordinary signification and interpretation, did not include a loss of this character, but because it is a part of the rule, which in this State allows a common carrier to contract against his liability for negligence, that the contract must in terms and expressly exempt the carrier from liability on this account."

**Decision in Principal Case.**—The decision in the principal case is undoubtedly correct. There seem to be but three possible views to be taken of the facts of the case so far as the matter of the insecurity of the car is concerned. First, that the servants of the carrier were negligent in the selection of the car. Second, that the company was negligent in not providing suitable cars; and, third, that neither the company nor its servants were negligent in the matter, and that the defect in the car was latent, and not to be discovered by reasonable inspection. In the first view of the case the carrier was exempted by the clause relating to negligence of the company's servants; in the third view of the case (if the facts warranted it) the carrier was exempted by the clause as to injury resulting from insecurity of cars; and the court held that the second view of the facts would not be entertained under the pleadings and evidence. In the second view of the facts

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the clauses in the bill of lading would not have exempted the railroad company.

On the general question of the validity of clauses in a bill of lading limiting liability, see note to case of *St. Louis Ins. Co. v. St. Louis, Vandalia, etc., R. R. Co.*, 3 Am. & Eng. R. R. Cas. 272, 273; note to *Chalk v. Charlotte, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 110; note *Rintoul v. New York Cent., etc., R. R. Co.*, 16 Am. & Eng. R. R. Cas. 149. For discussion of the liability of a common carrier who undertakes for the transportation of live animals, see note to *Holsapple v. Rome, W. & O. R. R. Co.*, 3 Am. & Eng. R. R. Cas. 489.

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### PRINCE

v.

### INTERNATIONAL AND GREAT NORTHERN R. R. Co.

(*Advance Case, Texas. May 12, 1885.*)

The duty of a railroad to transport passengers, and its liability for a breach thereof arising from the negligence of its servants, does not arise alone from the consideration paid for the service, but is imposed by law even where the service is gratuitous.

It is enough to fix the liability of a railroad for injuries occasioned by the negligence of its servants, that the passenger be lawfully on the train, whether by reason of having paid his passage-money or by permission or invitation of officers or agents of the company.

The question of liability does not depend upon the uses to which the train is usually devoted; and where there are no rules of the company prohibiting it, or even if there be such rules, and the officers making such rules relax or dispense with them in a particular instance, and passengers are taken on trains or cars not generally used for their transportation, or with the expectation of paying fare when demanded, they are lawfully upon the train, and the company owes them the duty of safe transportation.

A petition alleging that hand-cars were sometimes used by the company to transport employees, and that plaintiff, with others, took passage on one at the invitation of the company's agent, to go to a place where the corpse of a man had been found on the railroad-track, plaintiff being one of the jury of inquest, and that by the negligence of the company's servants in the management of said car he was injured, stated a good cause of action, not subject to demurrer.

APPEAL from Hays County.

*O. T. Brown* for appellant.

*Hutchison & Rose* for appellee.

THIS suit was brought by appellant against appellee to recover damages for personal injuries. Plaintiff alleged, in substance, that on August 31, 1884, the corpse of a dead man was found on defendant's railroad-track, a short distance from the town of San Marcos; that the coroner was notified, and thereupon summoned a



jury of inquest (one of which jurors plaintiff was) to investigate into the cause of the death of the aforesaid person; that said coroner and jury were about to proceed to the place where the body was lying in order to properly hold the inquest, when they were notified that the said corpse had been brought to San Marcos by a passing train; that said body was then viewed by said coroner and jury, but to better facilitate the inquest it was determined that they should go to the place where the body was found; that defendant, in order to facilitate the inquest, by its agent, invited the coroner and jury to accept transportation from San Marcos to said place where the body was found, which they did, the defendant furnishing hand-cars for that purpose, and such cars being run and operated under the conduct, management, and control of defendant; that while being conveyed as aforesaid, by and through the careless and negligent manner of defendant's agent, plaintiff was thrown from the said car and dragged along the ground by the car, sustaining serious injuries, etc. It was alleged that these hand-cars were not commonly used by defendant for the transportation of passengers as common carriers, but commonly used by defendant in the transportation of its agents and servants employed by it at work upon and about its said railroad track. A demurrer and special exceptions were urged and sustained to the petition and the cause dismissed, from which action of the court this appeal is taken.

**WILLIE, C. J.**—In sustaining the special demurrer to the petition the court below, in effect, held that as the railroad company did not commonly transport passengers upon hand-cars, and the appellant was injured whilst being transported gratuitously, at the invitation of the company's agents, upon one of these cars, he could not recover, though the injury happened through the negligence of the company's employees in charge of the car.

The duty of a railroad company to transport passengers safely, and its consequent liability for a breach of this duty arising from the negligence of its servants, do not result alone from the consideration paid for the service.

DUTY AS TO  
GRATUITOUS PAS-  
SENGER ON HAND-  
CAR.

"It is imposed by the law even where the service is gratuitous. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." *Coggs v. Bernhard*, 1 Smith's Leading Cases, 95; *P. & R. R. v. Derby*, 14 Howard, 486.

A gratuitous bailee must answer for goods left in his charge if lost through his gross negligence. A railroad company receiving passengers upon its cars cannot, through indifference to their safety, allow them to be injured in life or limb without accounting in damages, though they may have paid no passage-money. It is enough that the passenger is lawfully upon the cars of the com-

pany at the time he is injured. Whether he is lawfully or unlawfully upon the cars does not depend upon his having paid fare for his transportation. One may pay fare and yet be unlawfully upon the train, as in case of a passenger upon a freight train, when the rules of the company positively forbid the carrying of passengers upon such trains. *R. R. Co. v. Moore*, 49 Texas, 31.

On the other hand, one may be lawfully upon the cars without paying fare when he is there by invitation or permission of the officers having authority to allow him to ride free of charge. Nor does the question of whether or not a passenger is lawfully upon a train depend necessarily upon the purposes to which the train is usually devoted in the transportation of passengers; a person who has paid his fare, or has been invited to ride free of charge, is presumed to be lawfully upon the train. If, by rules of the company, passengers are expressly forbidden to be carried upon a particular train, the presumption is that any one claiming to be a passenger upon such a train is an intruder and without lawful right to be there. This presumption may be rebutted by showing that whilst the rules forbid the transportation of passengers upon these trains, yet, with the knowledge of the company and without objection on its part, they are habitually permitted to take passage upon such trains.

The company, through its proper officers, having the right to make these rules, may, through the same officers, relax or dispense with them, and the public are authorized to consider them as dispensed with when not practically enforced. The conductor cannot relax these regulations without the consent of the company, because he is the agent whose special duty it is to see that they are enforced, and any relaxation of the rules on his part would be disobedience of the orders of his superiors. This is the effect of the decision in *Railroad Co. v. Moore*, *supra*; and it follows from the principles of that decision that when there are no such rules, but passengers are taken upon cars not generally devoted to passenger service, a person who enters such cars as a passenger, by invitation of the agents in charge of them, or with the expectation of paying fare when demanded, is lawfully there and entitled to all the rights of a regular passenger. The rules of the company do not forbid his travelling upon these cars. He is encouraged to enter them by the fact that the company sometimes use them for the transportation of passengers. If improper for him to travel upon them at the particular time, he should be so informed by the officer in charge, or in some other proper manner.

In the present case it does not appear that the regulations of the company prohibited travelling upon a hand-car. On the contrary, it does not appear that these cars were sometimes thus used by the railroad company. The agents in

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charge of the car were not, therefore, violating orders when they permitted the plaintiff to take passage upon it. He certainly had no reason to suppose that he was acting unlawfully in the riding upon the car. It does not appear that the parties inviting the plaintiff to travel upon the hand-car were not authorized to take him upon the proposed trip free of charge, much less that he was made aware of that fact. In a word, the petition makes out a case of a passenger lawfully upon the car of the defendant company which the latter sometimes used for the transportation of passengers, invited by the proper agents to travel upon it free of charge, and injured by the negligence of the employees of the company in failing to use proper diligence in running the car. We think, in reason and upon authority—some of the cases bearing upon the question being collated below—he made out a case in his petition entitling him to recover. *P. & R. R. R. v. Derby, supra; Steamboat New World v. King*, 16 Howard, 469; *Wilton v. Middlesex R. R.*, 107 Mass. 108; *Carroll v. Staten Island R. R.*, 58 N. Y. 126.

As to what degree of diligence was required of the servants of the car under the circumstances, or for what negligence on their part the company would be liable, it is not for us to decide. The petition alleges that the plaintiff was injured through the negligence of the company's servants, which includes all degrees of negligence,—slight, ordinary, and gross,—and there was no special exception complaining that the kind of negligence was not stated, even if such an exception could have prevailed.

We think there was error in sustaining the general demurrer and special exceptions to the petition, for which error the judgment must be reversed and the cause remanded.

Reversed and remanded.

**Liability of Railroads for Injuries to Persons being Carried without Charge—Pass.**—One travelling on a railway pass or by invitation of the officers of the road may recover against the road for injuries caused by the gross or wilful negligence of its servants. Thus, where a stockholder in a road, while riding in a special engine by invitation of the president of the road, was injured in consequence of gross negligence of servants of the road, it was held that he could recover damages for his injuries thus caused. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468. In that case Grier, J., explains the nature of the liability of the railroad as follows: "The liability of the defendant below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they have to each other. It is true that a traveller by stage-coach or other public conveyance, who is injured by the negligence of the driver, has an action against the owner founded on his contract to carry him safely. But the maxim of *respondet superior*—which, by legal imputation, makes the master liable for the acts of his servant—is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master." For same principle, see *Jacobs v. St. Paul & Chicago R. R. Co.*, 20 Minn. 125; *Todd v. Old Colony*

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& *F. R. R. Co.*, 3 Allen (Mass.), 18; *Rose v. Des Moines Valley R. R. Co.*, 39 Iowa, 246; *Wilson v. Middlesex Road*, 107 Mass. 108; *Sherman v. Hannibal & St. Jo. R. R. Co.*, 4 Am. & Eng. R. R. Cas. 589. (The decision rests wholly or in part on an Iowa statute.) Opinion of Blackburn, J., in *Austin v. Great Western R. R. Co.*, 8 B. & S. 327, 334. But see *Kinney v. Central R. R. of New Jersey*, 34 N. J. L. 513.

**Degree of Negligence.**—Is the duty of the railroad company toward a gratuitous passenger satisfied by any less degree of care than in case of a passenger paying fare? It is contended in some cases that the carrier is, perhaps, liable in the case of a gratuitous passenger only for "gross" negligence. *Rose v. Des Moines Valley R. R. Co.*, 39 Iowa, 246, 252; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.), 18, 20. But in *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468, 486, Grier, J., says: "When carrier undertakes to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet 'gross.' To same effect see *Jacobus v. St. Paul & Chicago R. R. Co.*, 20 Minn. 125, 128.

**When the Person Injured was at the Time Stealing a Ride.**—If a person stealthily, and wholly without the knowledge of any of the employees of the company, gets upon a train and secretes himself for the purpose of passing from one place to another, he cannot recover if injured. In such a case his wrongful act bars him from all right to compensation. *Toledo, W. & W. R. R. Co. v. Brooks, Admx.*, 81 Ill. 245; *Toledo, W. & W. R. R. Co. v. Beggs*, 85 Ill. 80.

The same principle governs where the person injured knowingly induced the conductor or other servant of the railroad company to violate his duty to his employers by allowing such person to ride free. *Toledo, W. & W. R. R. Co. v. Brooks, Admx.*, 81 Ill. 245; *Chicago & Alton R. R. Co. v. Michie, Admx.*, 83 Ill. 427.

**The Validity of a Clause on a Pass Exempting the Railroad Company from Liability for Injury.**—It seems that a railroad company may exempt itself by a condition in a pass from liability for injury resulting from any degree of negligence less than "gross." *Kinney v. Central R. R. of New Jersey*, 34 N. J. L. 513; *Perkins v. New York Central R. R. Co.*, 24 N. Y. 196; *Wells v. New York Central R. R. Co.*, 24 N. Y. 181; *Knowlton v. Erie Ry. Co.*, 19 Ohio St. 260; *Bissell v. New York Central R. R. Co.*, 25 N. Y. 442; *McCauley v. Furness Ry. Co. L. R.*, 8 Q. B. 57; *Gallin v. London & Northwestern Ry. Co. L. R.*, 10 Q. B. 212; *Illinois Central R. R. Co. v. Read*, 87 Ill. 484.

All the above cases, with the exception of the New Jersey and Illinois cases, held that the company might exempt itself from liability for gross negligence as well as for ordinary negligence. Nor does the fact that no fare is paid seem material. The Illinois law permits a carrier to exempt itself by contract from liability, save for gross negligence, when the passenger pays a fare. *Arnold v. Illinois Central R. R. Co.*, 83 Ill. 278. The New York law and the English law permit a carrier to exempt itself by contract from liability for gross negligence even when the passenger pays a fare. Indeed, the English cases above cited were cases where a consideration was paid for the pass.

In some cases it has been held that a railroad company cannot exempt itself from liability for any negligence whatever by clauses or conditions printed or endorsed on a pass; that such conditions are wholly void as against public policy. *Jacobus v. St. Paul & Chicago R. R. Co.*, 20 Minn. 125; *Buffalo, P. & W. R. R. Co. v. O'Hara*, 9 Am. & Eng. R. R. Cas.

317; *Ross v. Des Moines Valley R. R. Co.*, 39 Iowa, 246. Decision based on statute of Iowa.

**Nature of Exemption.**—This exemption is in its nature a contract, and hence a valid consideration is necessary to support it. Hence, such a clause inserted in a ticket for which the full fare allowed by the legislature is paid, will not be enforced for want of a consideration. *Perkins v. New York Central R. R. Co.*, 24 N. Y. 196.

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SMITH

v.

LOUISVILLE AND NASHVILLE R. R. Co.

(75 *Alabama*, 449.)

Section 2899 of the Code of 1876, providing that "when the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or, if the father be not living, the mother, may maintain an action against such corporation, or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess," creates a new cause of action, is highly penal in its terms, and must be construed as a penal statute.

Said section of the Code (2899) is violative of section 12 of article 14 of the State Constitution, providing that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons," and is void.

This provision of the Constitution must mean that where the cases are alike, the cause of action, the same description of contract or tort, there must be no discrimination between corporations and natural persons in the matter of prosecuting or defending suits.

APPEAL from City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

*R. M. Williamson* and *Geo. W. Townsend*, for appellant, contended, *inter alia*, and argued at length, in reply to argument of counsel for the appellee, that the statute under consideration was constitutional, citing the following authorities: Code of 1852, §§ 1938-41; Acts 1871-2, p. 83; *Ib.* p. 82; *Dorman v. State*, 34 Ala. 216; *Cooley on Con. Lim.* 390; Art. 14, Sec. 12, Con. 1875; *Paul v. Virginia*, 8 Wall. 168; Code, 1876, § 2643; *Zeigler v. S. & N. R. R. Co.*, 58 Ala. 594; *S. & N. R. R. Co. v. Morris*, 65 Ala. 193.

*Thos. G. Jones* and *J. M. Falkner*, *contra*, contended that said statute was violative of section 12, article 14, of the Constitution of 1875, and cited the following authorities; *Holden v. James*, 11 Mass. 396; *S. & N. R. R. Co. v. Morris*, 65 Ala. 200; *Wally v. Kennedy*, 2 Yerger, 554; *Waddell v. Vanzant*, *Ib.* 260; *Cooley on Con. Lim.* §§ 391-3; 28 Wis. 464; 12 Bush (Ky.), 110.

STONE, J.—This is a suit by appellant, the father, against the appellee, corporation, under section 2899 of the Code of 1876, to recover damages for the alleged killing of the minor child of the former, through the wrongful act and omission of the defendant's agent. The section of the Code reads as follows:

"When the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess."

This statute creates an entirely new cause of action—one theretofore unknown. Before its enactment—Feb. 24, 1872—neither the father nor mother could recover damages for such killing. Not only does the statute create a new cause of action, but it confines the right to maintain such suit to the father, if living, and, if not, to the mother. If neither be living, no one else can maintain the suit. And the statute is highly penal in its terms, and must be construed as a penal statute.

Is the act copied above constitutional? It will be observed that under the statute the action lies only against certain classes,—corporations and private associations of persons. These are held accountable for the wrongful acts and omissions of their officers and agents. Individuals engaged in the same business, having the same description of officers or agents, may cause the death of a minor child by the wrongful act or omission of such officer or agent, and there will be no liability for such death. To illustrate: Manufacturing establishments in all their extensive variety, mining enterprises, cotton-compressors, mills, steam-vessels, and even railroads, may be owned and operated without incorporation, and by a single proprietor. These are not within the law; and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither the father nor the mother can maintain a suit. If, however, there be more owners than one, or if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother, if he be dead. This precise difference the statute makes, although the character of business and the wrongful act or omission of the agent be, in each case, the same. How this will work will readily suggest itself. If the employer, being a single individual, be not responsible for the wrongful act or omission of the agent he employs, how can the same act by the same agent, employed under the same circumstances, impose a penalty on the innocent employer, merely because two or more owned the business and united in employing the agent? If so,

ACTION FOR  
CAUSING DEATH  
—WHO BY—CON-  
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STATUTE GIVING  
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on what principle? Is individual enterprise less amenable to legislative surveillance than associated capital?

Within the last twenty years very important constitutional provisions, Federal and State, have been adopted. Article 14 of the Amendments to the Constitution of the United States declares, section 1, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Speaking of this provision, Justice Field, of the U. S. Supreme Court, in *County of San Mateo v. So. P. R. R.*, 8 Am. & Eng. R. R. Cas. 1, said: "It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances." 8 Am. & Eng. R. R. Cas. 1-11 (8 Sawyer, 238). And Circuit Justice Sawyer, in the same case, p. 33, said: "In my judgment, the word 'person' [in this clause of the 14th Amendment] includes a private corporation." See note to that case on page 56. This question, however, would seem to be settled by our own State Constitution, article 14, section 12, which ordains that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons." "In like cases as natural persons" must mean that where the cases are alike, the cause of action the same description of contract or tort, there must be no discrimination between corporations and natural persons in the matter of prosecuting or defending suits. A tort which will support an action for one will support it for the other, and a defence available to one is available to the other. *Mayor v. Stonewall Ins. Co.*, 53 Ala. 570; *Green v. The State*, 73 Ala. 26. The sum of these provisions is, that no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes. And so we held in *S. & N. R. Co. v. Morris*, 65 Ala. 193, reaffirmed in *Home Protection Ins. Co. v. Richards*, 74 Ala. 466. See, also, *Strauder v. West Virginia*, 100 U. S. 303. In *Richards's case*, *supra*, we sanctioned a different rule as to venue—the mere form of proceeding—when a corporation is sued. We reached this conclusion by force of the corporation's mode of conducting its business; that its scene of active operations is ambulatory, and its domicile, if domicile it has, is essentially unlike, as its business transactions are unlike, those of a living human being. The difference commented on in that case did not affect the nature or measure of liability, but only the forum, or form of its enforcement. If the effect of the statute, therein construed and held constitutional, had been to fasten a liability on one class, from which the other class was exempt, the case would have been con-

sidered as falling properly within the influence of *Mayor v. Stone-wall Insurance Co.*, and *S. & N. R. R. Co. v. Morris*, *supra*.

In the very well considered case of *Chicago, St. Louis & N. O. R. R. Co. v. Moss*, 60 Miss. 641; s. c., 20 Am. & Eng. R. R. Cas. 555, our decision in *S. & N. R. R. v. Morris* is commented on, approved, and followed. See, also, *Gordon v. W. Building & A. Fund Asso.*, 12 Bush (Ky.), 110; *Durker v. Jariesville*, 28 Wis. 464.

We regret the duty, so often cast upon us, of construing statutes which discriminate between persons, natural and artificial, sometimes in favor of the one, and sometimes in favor of the other; but we have no discretion. We feel constrained to hold the section of the Code under which this action was brought to be unconstitutional.

The present case was tried in the court below on issues which did not directly raise the question we have been considering. It is manifest, however, that the action was brought under section 2899 of the Code, and that without that statute it cannot be maintained. That statute being pronounced unconstitutional, it is equally manifest that the plaintiff in the present suit never can recover. We will not scrutinize the various rulings of the city court, for, right or wrong, they did the appellant no injury. 1 Brick. Dig. 780, § 96.

Affirmed.

BRICKELL, C. J., dissenting.

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## DALLAS AND WICHITA R. R. Co.

v.

SPICKER.

(61 Texas Reports, 427.)

The employee of an independent contractor engaged in building a railroad was killed while travelling on the road by an accident to the train caused by a defective bridge. There was nothing to show that deceased had any knowledge of the defect. In a suit against the railroad company to recover damages for the death,

*Held*, that the burden was not on the plaintiff to disprove contributory negligence.

The wife recovered a judgment against a railway company for \$5000 damages, for the killing of her husband; she had lived separate and apart from him for a year before the injury which resulted in his death. *Held*:

(1) The fact of their separation would not deprive the wife, so long as the conjugal relation existed, of a decent support according to her state and condition in life, so long as she did nothing to forfeit that right by her own wrong.



(2) No legal presumption can be indulged that the marital relation can ever be dissolved, except by the death of one of the parties.

In a suit for damages by the wife and mother for the wrongful killing of the deceased, evidence showing the ability of the deceased, had he lived, to render pecuniary aid to his wife and mother is proper.

See opinion for a charge asked of court to the effect that, in a suit by the wife for damages for the wrongful killing of her husband, the fact that the husband had abandoned the wife would, if the jury should believe that the abandonment was permanent, entitle the wife to only nominal damages. *Held*, to have been properly refused.

**APPEAL** from Dallas. Tried below before the Hon. Geo. N. Aldredge.

Plaintiff below, Hannah T. Spicker, alleged that her husband, Henry Spicker, while being transported in a train of cars over one of defendant's bridges, received injuries of which thereafter he died; that they were caused by the giving-way of the bridge, and the falling-through of the train; that the bridge was constructed by defendant negligently, and without care, in disregard of human life, and was permitted to become, for want of proper care, unsafe and dangerous to human life; that Henry Spicker, when he received the injuries, was an employee of independent contractors engaged in the construction of defendant's road, and by defendant's consent, its train, owned and operated by it (but for construction purposes), was being operated over the bridge when deceased was injured; that plaintiff was the surviving wife of said Spicker, who left neither father nor children, and whose mother, Elizabeth Spicker, resided in Cass County, Illinois; that the suit was brought for the benefit of the mother as well as plaintiff; that by the death of said Spicker plaintiff had sustained loss and damage in the sum of \$15,000, and the mother had been damaged \$10,000.

Defendant filed a general denial, and pleaded specially, in substance:

1. That said Henry Spicker was neither an employee of defendant nor a passenger on its road, but was an employee of Boyle & Runnels, independent contractors engaged in the construction of defendant's road; that the road where Spicker was injured had not been accepted by defendant, nor was it using it, but it was then being used by Boyle & Runnels in its further construction.

2. That if defendant's bridge was defective and unsafe, the fact was well known to deceased before it gave way, and that, by remaining in the service of Boyle & Runnels, with knowledge that the bridge was unsafe, and that he would have to pass over it, he thereby assumed such risks as were incident to that service.

3. That if Spicker was ever the husband of plaintiff they had separated and abandoned each other long prior to his death, and were not then living together as man and wife; that Spicker did not then recognize plaintiff as his wife; and repeatedly asserted, just prior to his death, that he had no wife; and that if he was

nominally plaintiff's husband she had no reasonable expectation of deriving benefit or profit from the continuance of his life.

Verdict for the plaintiff, Hannah T. Spicker, for \$5,000, and for the mother for one dollar. Judgment accordingly.

*R. E. Cowart and Saunie Robertson* for appellee.

STAYTON, J.—Complaint is made that the court below instructed the jury "that the burden of proving that Henry Spicker knew of the defective construction and unsafe condition of the bridge is on the defendant."

The defendant, in its answer, alleged that the defects in its KNOWLEDGE OF DEFECTS — BURDEN OF PROOF. bridge from which resulted the injury to Henry Spicker were known to him, and such knowledge, coupled with his passing over the bridge, was made the grounds of the defence of contributory negligence on the part of the injured person, on account of whose death this suit was brought by his wife and mother.

The ordinary rule, which places the burden of proof upon the person who, as a cause of action or defence, alleges an affirmative matter would seem to be applicable to cases of this character as to others.

It would seem that a plaintiff would be entitled in every case of this character to recover upon evidence which clearly makes a *prima facie* case, unless such case be rebutted by testimony offered by himself or by the defendant.

In the case before us the evidence clearly shows that Henry Spicker received the injury from which he died in consequence of the fact that the appellant had erected, on and as a part of its road, a bridge, over which it was intended its trains should pass, which was, within the knowledge of the chief engineer of the company and other of its officers and agents, so negligently and defectively constructed as to be unfit and unsafe for the use intended. The injury of which the appellees complain resulted from those defects, and this, no further or exculpatory facts appearing, entitled the plaintiffs on this branch of the case to recover.

There is some apparent conflict of authority on this question. It is, however, believed to be more apparent than real, and we have now no disposition to review the cases which are supposed to hold that it is necessary not only for a plaintiff to prove that the injury of which he complains resulted from the negligence of the defendant, but that he must also prove that he himself was in the exercise of due care.

We believe the true rule to be that thus stated by an elementary writer: "No doubt where, in an action for injuries caused by failure of duty on the part of the defendant, the failure of duty and the injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the

burden is on the defendant to prove that the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion." Wharton on Negligence, 426.

There is no fact in proof in this case which tends to show contributory negligence by the deceased. That employees of the railway company may have known of the defective construction of the bridge by reason of their having assisted in its construction; or that the employer of the deceased may have known of the defects; or that persons working for the railroad, in its employment, may have known of the defects in the bridge, is not evidence of the fact that the deceased, who was not in the employment of the railroad company, had any such notice. If such knowledge existed, it should have been shown by the defendant by such proof as would be admissible for such a purpose.

We believe the correct rule as to the burden of proof to be stated in considering the sufficiency of the petition in *T. & P. Ry. Co. v. Murphy*, 46 Tex. 356.

It is urged that the judgment in favor of the wife of the deceased for \$5000 is excessive, and that the court erred in refusing to give the following charge asked by the defendant: "If the jury believe, from the evidence, that a year or more before Henry Spicker's death he left his wife, and, after that, had no further communication with her; and further believe, from the evidence, that he had abandoned her for good, and that at the time of his death she had no reasonable expectation of deriving any aid or advantage from the continuance of said Henry Spicker's life, then, and in that event, so far as the plaintiff, Hannah Spicker, is concerned, the jury should either find for the defendant, or only allow her, the said Hannah, nominal damages." DAMAGES HELD  
NOT EXCESSIVE.

The deceased was thirty-one years old at the time of his death, was sober and industrious, and of good physical constitution for some time before he received the injury; but there is evidence tending to show that at some former period he may have been intemperate in his habits, from which some estrangement may have arisen between him and his wife. He was a druggist by profession, although, at the time of his death, engaged in other business under contract with those persons who had undertaken to grade the road and thereon lay the rails for the appellant company, and for his services therein he was receiving \$2.50 per day. We are not prepared to say that the judgment under the facts is excessive. The amount of damage to which the appellees were entitled was for the jury to determine, and under the facts in proof there is nothing to indicate that the verdict was not the result of a conscientious and honest investigation of the case under all its facts. The charge given fairly submitted the question of damages to the jury.

DESERTED WIFE  
MAY SUE FOR  
HUSBAND'S  
DEATH.

If the charge asked and refused, in any case, when a suit is brought by a wife for injuries resulting from the death of a husband would be correct, it may well be doubted if the evidence in this case would have justified such a charge.

The charge, however, was erroneous. Henry Spicker may have left his wife for a year or more before his death, and after leaving her may have had no further communication with her, and may have intended never to return to her or contribute to her support; yet, so long as the marital relation existed, without reference to the will of the husband, the wife not being shown to have forfeited her right thereto by her own wrong, she was entitled to a decent support, in accordance with their station in life, from her husband.

The marital relation created this right, and it would have continued to exist so long as the relationship continued, and so, without reference to the will of the husband. There is no legal presumption that such relation would ever have been dissolved prior to the time when one of the parties thereto, in the ordinary course of events, would have died. The wrong of the appellant terminated the relationship by causing the death of the husband prior to the time when, in the ordinary course of events, he would have died, and thereby deprive the wife of that pecuniary support and benefit which the law would have entitled her to from her husband so long as they remained husband and wife.

In a suit by a parent for injuries resulting from the death of a minor child, in so far as the claim might be based on the services of the child before majority, the will of the child to render its services to the parent, or to permit the parent to have the proceeds of its labor, would be an unimportant inquiry; for the law gives the parent the right to both; hence an inquiry as to the probability that the child during minority would have remained in the service of the parent, or would have permitted the parent to have the proceeds of its labor rendered in the service of others, would be likewise unimportant and irrelevant, unless it was shown that the child had in some way been emancipated by the parent.

The same rule would not apply where no legal right to benefit existed, as in case of a suit by a parent for an injury to a child after majority which resulted in death. In such a case it would be proper to show the reasonable expectation of benefit which the parent would have received had the child not been killed, and, in the absence of legal right to benefit prior to the death of the child, this would depend on the will and ability of the child to confer benefit on the parent. In such a case, evidence throwing light on these matters would be proper, and should be considered by a jury under a proper instruction.

In this case evidence was introduced to enable the jury to ascertain the ability of the deceased, had he lived, to contribute pecuniary aid

to his wife and to his mother; and the fact that the damage given to the mother is very small furnishes no ground of complaint to the appellant, it not appearing that the judgment in favor of the wife is excessive. There is no error in the judgment for which it should be reversed, and it is affirmed.

**Affirmed.**

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**LETT**

*v.*

**ST. LAWRENCE AND OTTAWA RY. CO.**

(11 *Ontario Appeal*, 1.)

Under the provisions of Lord Campbell's Act, Imp. Stat. 9-10 Vict. ch. 93, R. S. O. ch. 128, the husband of a woman killed by accident, suing as her administrator, is entitled to recover damages for himself and her children, although there may be no evidence showing that she was entitled for life to rents or other income.

The injury contemplated by the statute means injury resulting in the loss of money, present or prospective, but proximate or direct.

THIS was an appeal from the judgment of the Queen's Bench Division, reported 1 O. R. 545, where the facts are clearly stated, and came on to be heard on the 9th of September, 1884. Present: Burton, Patterson, J. J. A.; Galt and Rose, J. J.

*Oslor*, Q. C., for appellant.

*Bethune*, Q. C., for respondents.

BURTON, J. A.—I have read with great care and much interest the very able opinion of the dissenting Judge in the Court below, but am unable fully to agree with his conclusion.

My Brother Patterson has displayed his usual industry in collecting most of the English decisions to be found bearing on the construction of the statute of which ours is a transcript, and has arranged them in their chronological order in the judgment he will deliver. I have also called to his notice one which he had overlooked, to which I shall have occasion presently to refer.

They seem to me to follow and confirm the construction placed upon Lord Campbell's Act very shortly after its passage in *Blake v. Midland*, 18 Q. B. 93, that the damages to be recovered do not extend to a solatium to soothe the feelings of the family for the loss of their relation, but are strictly confined to injuries of which a pecuniary estimate may be made. To what this may extend is a question upon the evidence in each particular case, and it may sometimes be found difficult to draw the line. It was also held, very shortly after

GRIEF NOT AN  
ELEMENT OF  
DAMAGE FOR  
DEATH. ONLY  
PECUNIARY LOSS  
RECOVERABLE.

the passage of the Act, that the condition referred to in the Act restricting the action to cases in which the deceased might have maintained an action if death had not ensued, had reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose and the nature of the wrongful act, neglect, or default complained of. Thus, if it were established that the injury was the result of the deceased's own negligence, or where he had received satisfaction during his life, no action was maintainable by the personal representative. The statute did not, however, transfer the rights which the deceased would have had, but created a new right of action on entirely different principles. The action being not for the loss or suffering of the deceased, nor the injury to the feelings of his surviving relatives, but a new remedy, creature of the statute, given to the estate of the deceased in trust for the persons named, according to the actual pecuniary loss sustained by each.

The word "pecuniary" is not to be found in the English, as it is in most, if not all, of the American Acts, but that was the interpretation placed upon it by the English Courts shortly after its passage and continuously followed. The injury forming the basis of calculation must be pecuniary; nothing else can enter into the estimate. There can be no recovery, it is admitted, for loss of society or wounded feelings, nor for anything else, in my opinion, which cannot be measured by money and satisfied by a pecuniary recompense.

What is included in that definition is the question, and is one which might in some cases be very difficult to decide. I shall confine myself to considering whether there was any evidence in the present case of such a pecuniary loss as comes within the meaning of the statute.

I agree that legal liability is not the test, but that a person named in the statute may recover if there was a reasonable expectation of pecuniary advantage by the relatives remaining alive. To prove, however, that reasonable expectation, there must be evidence from which a jury may be able to arrive, otherwise than by guess or conjecture, at the conclusion that there was in effect such reasonable expectation.

Thus, upon proper evidence, a parent may recover for the loss of the probability that his son would have continued to contribute to his maintenance. The case of *Pym v. The Great Northern*, 2 B. & S. 750, 4 B. & S. 396, is a case which proceeds partly upon this principle.

There, the parent's means being proved, it was a reasonable inference that a part of that income would be applied to the education and comfort of the children; and it was, in fact, assumed in that case that at the time of the death the deceased was living with his family in the ordinary manner, bringing up his

CONTRIBUTORY  
NEGLIGENCE OR  
SATISFACTION  
BEFORE DEATH  
BARS ACTION.

REASONABLE EX-  
PECTATION OF  
PECUNIARY  
BENEFIT SUP-  
PLIES.

PARENT MAY RE-  
COVER FOR  
CHILD'S DEATH.

children in the position in society which that income would command.

It is true that it must always remain a matter of uncertainty, whether the deceased parent would have applied his income to the securing for his family the social and domestic advantages of which they were deprived by his death, or whether he would have laid by any portion of his income to make provision for them at his death; but there being a reasonable expectation that the income would be so applied, the extinction of such expectation by negligence occasioning the death of the party from whom it arose is sufficient to maintain the action, it being for the jury to say, under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there is such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages in such an action.

There is, therefore, always a preliminary question for the Judge before the case can properly be submitted to the jury, of whether there is any evidence that the person for whose benefit the action is brought did sustain any pecuniary loss by the death of the deceased, or whether there was any reasonable probability of a pecuniary benefit accruing to him in consequence.

In an Irish case, *Condon v. Great Southern R. W. Co.*, Ir. R. 16, C. L. 415, very slight evidence was held sufficient to go to the jury.

The action was by a widow for the death of her son, aged 14. Her husband had been killed by the same accident, and she recovered for his loss £400. The boy was being sent to school, but when at home used to work on the farm in his father's absence. He never earned any wages, but his capabilities were valued at 6d. per day. It was held that the probability (increased by the past filial conduct of the boy) that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, was evidence to go to the jury.

I think that such a case could scarcely have been withdrawn from the jury; but in the case of *Holleran v. Bagnell*, Ir. R. 6, C. L. 333, where an action was brought by a father for the death of his daughter, who was about the age of seven, where the only evidence given to show that the plaintiff had sustained a pecuniary loss was that she had been in the habit of rendering trifling household services, but which were incapable of being estimated at any pecuniary value, the Court held that there was no evidence fit to submit to a jury.

The only two cases in which I can find any distinct rulings in the case of a husband or child suing for the loss of a wife are: one in the English Courts decided in 1866, and of which a very meagre account is given in the Weekly

HUSBAND MAY  
RECOVER FOR  
LOSS OF WIFE.

Notes, and one in the State of New York—the case of *Mitchell v. The New York Central*, reported in 2 Hun, 535.

In that case the plaintiff recovered a verdict of \$4000, which was moved against on the ground, among others, that in this class of actions the recovery must be confined to pecuniary loss sustained by the death of the deceased, and that these could only be awarded on proof of loss, the burden being upon the plaintiff to show this.

In that case no pecuniary loss was shown, except what might be inferred from the two facts that the deceased was a married woman; and aged 20 years. There was no evidence given of her capabilities, mental or physical, nor of her situation and circumstances in life, nor how she had or could be of benefit to her husband and next of kin.

There was no proof whatever showing that her life was of any pecuniary advantage to any one, and therefore there was no proof of any pecuniary loss to any one by her death, and the Court set aside the verdict.

In the other, the case of *Chant v. The Southeastern R. W. Co.*, the only report of which I have been able to find is in the *Weekly Notes* of 1861. In that case no evidence was given of the pecuniary loss, but the jury returned a verdict for £200, which was moved against and a new trial asked for, simply on the ground of excessive damages, or to reduce the damages.

It was contended that there was no evidence of pecuniary assistance rendered to the plaintiff by his wife, and that she might have been an invalid, and so a burden to him. But the Court thought that in the absence of evidence to the contrary it must be assumed that she was a person of average health, industry, and good character; that to a poor man such a wife gave pecuniary assistance in keeping house, etc.; that they could not grant a new trial on account of the amount being excessive, and as no sum was named to which the damages should be reduced, the rule must be discharged on that branch also. The names of the Judges are not given; and as there can be no recovery in such a suit for nominal damages, the case seems rather opposed to those in which, no damages being actually shown, the verdict was held, necessarily, to be for the defendant.

But it will be observed that the Railway Company do not appear to have taken the point in their rule that there could be no recovery in such a case, but merely applied for a new trial on the ground of excessive damages; and the Court, having that question only before them, held there was no ground for their interference.

I do not trouble myself to refer to the American decisions on the subject, inasmuch as there are a great many of them which are clearly not good law with us, and I venture to think are not good law anywhere,—such, for instance, as *Terry v. Jewett*, 17 Hun, 395, where the action was brought for the loss of

RECOVERY BY  
FATHER FOR  
DAUGHTER.



his daughter by a father who, in a pecuniary sense, profited by her death. No evidence of any pecuniary loss was given, but the Judge was requested to tell the jury that in estimating damages the jury might consider the fact that the plaintiff, as next of kin, would be entitled to her property.

It was thus disposed of: "The request was but little less than asking the Court to charge that the defendant, having benefited the plaintiff by killing his daughter, and thus putting him in possession of her estate, is entitled to a compensation for the service in reduction of the damages given by the statute."

In *McIntyre v. The New York Central*, 37 N. Y. 287, the mother, in respect of whose death the action WAS  
brought, was a widow between 45 and 50 years of age; CHILD MAY RE-  
COVER FOR  
MOTHER'S  
DEATH.  
it was shown that she was earning a small sum, and from this source made occasional presents in the way of clothing and other small articles to her children, who were grown up and not living with her. It was not possible, therefore, to withdraw the case from the jury, who gave a verdict for \$3500. The Court below thought the verdict should be reduced; and it is quite  
clear that if the case had occurred in England, the ver-  
dict would have been reduced or a new trial granted. See *Franklin v. Southeastern Railway*, 3 H. & N. 211, where evidence showed that the son who was killed was young, earning good wages, and apparently well disposed to assist his father, and, in fact, he had so assisted him to the extent of 3s. 6d. a week. There was, in the opinion of the Court, evidence sufficient to go to the jury, although they expressed the opinion that they certainly ought not to make a guess in the matter, but ought to be satisfied that there had been a loss of sensible and appreciable pecuniary benefit; but the jury having given a verdict for £75, the Court held it excessive, and granted a new trial. RECOVERY FOR  
DEATH OF SON.

In another case, *Pennsylvania Railway v. Goodman*, 62 Penn. 329, although the judge told the jury that nothing was  
allowable for the suffering of the deceased nor for RECOVERY FOR  
DEATH OF WIFE.  
the wounded feelings of the plaintiff, he also told them that they were to measure them by a just estimate of the services and companionship of the wife, and a verdict for over \$9000 on such a charge was allowed to stand.

But whilst it is sufficient to entitle the plaintiff to recover to show a reasonable expectation of pecuniary advantage, that pecuniary advantage must be owing to the relationship subsisting between them. Where, as in the case of *Sykes v. The Northeastern Ry. Co.*, 44 L. J. C. P. 19, the deceased relative worked for his father for wages, and was of great assistance to him in advising him in his business, it was held that the father could not recover. WHETHER COM-  
PANIONSHIP OF  
WIFE IS AN ELE-  
MENT OF RE-  
COVERY DIS-  
CUSSED.

How, then, should this case be considered, in the first place, as

regards the husband's claim? Had the wife been injured, and had subsequently died from her injuries, the husband before the statute might have brought an action for the loss of her society, and the loss of services during the period of her illness, but not for anything of that nature after her death. And I do not think that any change in this respect has been made by the statute, but that the damages to be recovered, and which may be recovered, not by the husband only, but by any of the class mentioned in the statute, are of an entirely different character, and must be such as would readily admit of a pecuniary estimate.

If those attentions and services which a wife ordinarily renders to her husband can be made the basis of a recovery, the inconvenience would be as great as in cases in which the allowance of compensation for mental anguish has been disallowed; in fact, juries would in effect give verdicts upon that basis without any means of correcting their errors.

The difficulty in giving direction to juries, and in juries acting upon the direction as to the proper estimate of damages, is great enough where the evidence deals with the profits of the deceased, or the amount of his income, even with the assistance of experts and annuity tables, but this will be light as compared with those with which the inquiry will become entangled, if the jury are to be called upon to fix a pecuniary estimate upon the loss which a husband sustains by being deprived of the ordinary services, care, and attention of a wife. Where she is herself contributing to his income by moneys of her own earning, there is something tangible to deal with, and the means are thereby afforded of enabling a jury to come to a conclusion upon some well-defined ground, and the court to deal with the amount of the verdict in case it should subsequently be moved against as excessive. If damages can be given on the general grounds I have stated, it would seem to follow that evidence would be receivable to show the character and capacity of the deceased, which, in many cases, might be of a very painful character.

The care, intellectual culture, and moral training which the mother could supply are, no doubt, "pearls of great price," but they are not to be measured by money, and it was never the intention of the legislature, in my opinion, that they should be made the subject of estimate or inquiry by a jury leading to the inquisitorial and painful investigation to which I have already referred.

The injury contemplated by the statute means, I think, an injury resulting in the loss of money present or prospective, but proximate and direct; and it is because I do not find any evidence proper to submit to a jury of any loss to the husband of this character that I come to the conclusion that the judgment in the court below was correct.

I think also, upon the finding of the jury as to the income from

the real estate, that the evidence fails as to the children, who were deprived, no doubt, of the care and attention of a kind parent, but who are not shown to have suffered any pecuniary loss within the meaning of the statute.

I am of opinion that the appeal should be dismissed.

PATTERSON, J. A.—The plaintiff sues as administrator of his wife, under the statute R. S. O. ch. 128, secs. 2 and 3.

FACTS.

The action was tried before my brother Osler, with a jury.

There was a verdict for the plaintiff for \$5800, distributing \$1500 to the plaintiff himself, and the remainder in sums of different amounts to five of the children of the deceased and of the plaintiff.

The jury stated that no part of the damages was assessed in respect of income derived by the deceased from some property.

The case is one which has not an exact parallel in any case reported in the English reports or in those of our own courts; because it raises the question of the right to recover damages for the death of a wife and mother, based altogether on the expectation of benefit from her personal services, and not at all upon any actual income, or earnings in money, of which she was in receipt.

There was an objection taken to the verdict for misdirection as to a matter which formed part of the evidence of negligence. I think it was properly disposed of in the court below, and I do not propose now to discuss it.

The main question has been elaborately discussed, and most of the decisions bearing upon it have been commented on in the judgments delivered in the court below, and I believe they have received equal attention from my learned brothers in this court; but the novelty as well as importance of the matter for decision, and the fact that we necessarily rely very much upon the views held by the English courts in dealing with Lord Campbell's Act (9 and 10 Vic. ch. 93) from which our statute is taken, and the existence of different opinions in the court whose judgment we are now reviewing, must be my justification for again referring to them.

I propose to trace the history of the administration of Lord Campbell's Act in England by glancing, as briefly as may be consistent with perspicuity, at all the reported decisions I have been able to find which involve anything beyond matters of practice or pleading.

HISTORY OF  
LORD CAMP-  
BELL'S ACT IN  
ENGLAND, AT  
AUTHORITIES RE-  
VIEWED.

The enactments we are to keep in mind are that "wherever the death of a person has been caused by such wrongful act, neglect, or default as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued shall be liable to an action for damages, not-

withstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony," and that "every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased," and "in every such action the judge or jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."

The English act passed in 1846. The earliest case under it, of which I have seen a note, is *Armsworth v. Southeastern Ry. Co.*, 11 Jur. 758, before Parke, B., at *Nisi Prius*. He charged the jury that damages were not to be estimated according to the value of the deceased's life calculated by annuity tables; but that they should give what they considered a fair compensation to the widow and children.

Then there is the case of *Tucker v. Chaplain*, 2 C. & K. 730, in 1848, in which Lord Denman, at *Nisi Prius*, laid down the rule which has always been acted on, and which was affirmed in subsequent cases to which I shall refer, that the inquiries as to negligence of the defendant and contributory negligence of the deceased were as applicable in the action by the personal representative as if the action had been by the person injured. There was no question in this case as to the principle on which damages were to be assessed.

At the end of the same year, 1848, the case of *Gillard v. Lancashire & Yorkshire Ry. Co.*, 12 L. T. 356, was tried in the Exchequer before Pollock, C.B., and a jury. The plaintiff claimed as widow and administratrix of the deceased, and did not claim on behalf of any of his children. Some remarks, reported as having fallen from the learned Chief Baron, have sometimes been quoted as if they indicated his opinion that a husband could not claim damages under the Statute in respect of the death of his wife, except in the one case of the wife having had a pension or annuity which died with her.

I do not read the language as fairly open to that construction, and that it was not intended to be so understood is plainly indicated by the Chief Baron's placing the case of a wife claiming for the death of her husband on precisely the same footing. It is evident from the whole report that the Chief Baron was combating an attempt to recover damages for injury to the feelings, and that his object in what he said was to confine the right to damages such as have been described in other cases as damages capable of being estimated on a pecuniary basis.

If he had any idea of laying down a narrower rule, it will clearly appear from the judgments afterwards pronounced by the

same learned Judge, to which I have to advert, that the idea was soon given up.

I shall make some quotations from the remarks attributed to the Chief Baron, for the purpose of showing that he really was not laying down any narrower rule than that followed in later cases; and that, at all events, he made no distinction, unfavorable to a surviving husband, between the cases of husband claiming for the death of his wife, and wife claiming for the death of her husband. The report does not state the circumstances of the husband whose death was the foundation of the action, nor whether his income was earned by his labor or derived from some other source. It may have been the latter, and, if so, that circumstance would account for the allusions to loss of income by the Chief Baron, who of course spoke with reference to the facts before him. He is reported to have said, when rejecting evidence offered to show the situation of the plaintiff with relation to her children as a foundation for enhanced damages of the character of those claimed in other classes of actions for mental suffering, that he had frequently expressed the opinion that the question was a pure question of pecuniary compensation, and nothing more, which was contemplated by the Statute. This he illustrated by pointing out that the richest peer of England who had married a lady enjoying a pension might bring an action for the loss of the pension by the death of his wife, while the poorest peasant, although his mental sufferings from the loss of his wife might be as great or greater, but who lost nothing by the death of his wife, was not entitled to sue. "All that is lost," he said, "which is appreciable after the death of the party killed is the pecuniary loss sustained by his family; and this Act enables them to recover that which the deceased would himself have sued for had the accident not terminated fatally. The framers of the Act never meant to give compensation to the parent for the mere deprivation of his son, or to the widow for that of her husband." Then he illustrated that proposition by supposing the case of the loss of the only child of a wealthy man. Sir F. Thesiger, who was counsel for the plaintiff, observed: "In that view a widower would not be entitled to sue for compensation for the loss of the society and comfort of his wife;" and the Chief Baron answered: "Clearly not, unless her death is the cause of pecuniary loss to her husband." Counsel put another case of the death of a weak and sickly child who was a burden to his parents, and suggested that the framers of the Act intended to remove the anomaly which existed in the law by giving a right of action in that case, to which the Chief Baron's reply was: "It may be so, but I can only administer the law as I find it expressed in the Statute before me. It is my unalterable opinion that this Act is confined to compensation for pecuniary losses only, and I shall reject the evidence, inviting a bill of exceptions to my ruling." In

charging the jury the Chief Baron explained the anomaly under the law as it had been, and said: "This statute proposed to correct this anomaly; but it did not create any new ground of action. It only transferred to a man's family the right which he would have had if he had survived the negligence of the wrongdoer. The meaning of this enactment is this: If a man's life is valuable to his family by reason of his possession of an annuity, his family have now the right to say: 'We have lost the life on which this annuity hung,' and they may claim compensation for its loss, but nothing more. They cannot enter into the question of shock to their feelings. If a different view were to be adopted it would be difficult to say where the calculation of damages ought to stop. If, however, the mere pecuniary loss be set as the measure of damage, a rational construction would be put on the statute, which, it must be remarked, is limited to the case of wife, husband, parent, and child, excluding nephews and uncles and more distant relations who would in all probability not be dependent on the life lost. Acting on this view of the Statute, the jury would say what damages they would award to the plaintiff, whose claim must be measured by such part of the income proved to have been possessed by her husband as they might think she enjoyed during his life. She had not made any claim as required by the Act on account of her child, and her condition with respect to her children could not be taken into estimation."

There are four cases before courts *in banc* reported in 1849 and 1850—*Dakin v. Brown*, 8 C. B. 92; *Reedie v. London and North-western R. W. Co.*, 4 Ex. 244; *Wigmore v. Jay*, 5 Ex. 354; and *Barnes v. Ward*, 9 C. B. 392—in none of which was there any question of damages; but in 1852, *Blake v. Midland Counties R. W. Co.*, 18 Q. B. 83, was decided, and settled the law on the footing acted on four years earlier in *Gillard v. Lancashire & Yorkshire R. W. Co.*, by Pollock, C.B. The question was stated by Coleridge, J., who delivered the judgment of the court, to be whether the jury in giving damages proportioned to the injury resulting from the death of the deceased to the parties for whose benefit the action was brought, were confined to injuries of which a pecuniary estimate could be made, or might add a solatium to those parties in respect of the mental sufferings occasioned by such death. That question he proceeds to solve by several arguments, amongst others the improbability that the Legislature would have thrown upon the jury such great difficulty in calculating and apportioning the solatium to the different members of the family, without some rules for their guidance, and concludes by saying: "For these reasons we are of opinion that the learned Judge at the trial ought more explicitly to have told the jury that, in assessing the damages they could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband, and that as the damages cer-

tainly exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive."

This decision has always been followed as decisive against the right, under the statute, to any damages of a merely sentimental character, or incapable of a pecuniary estimate; but it does not attempt any further definition of damages of the latter class. Subsequent cases afford instances of what may be brought within the category.

In *Hicks v. Newport, etc. R. W. Co.*, reported in a note at p. 403 of 4 B. & S., Lord Campbell, in 1857, directed the jury not to look to the wants of the family, but to the loss they had sustained by their father's death, and to deduct the amount of insurance money received from an accident-policy which fell in by reason of his death.

In the same year the case of *Bramall v. Lees*, 29 L. T. 111 and 166, in the Exchequer, may be usefully referred to as illustrating the sense in which Pollock, C.B., used or understood the term "pecuniary loss." In that case a father had recovered a verdict of £15 for the death of a daughter twelve years old, who had never earned any money, but who might, it was said, have got employment in a year or so in a factory where she would have earned wages. The verdict was moved against, and after consideration Pollock, C.B., said: "It was a case tried by my brother Crompton at Liverpool, and the court thinks that if Mr. Knowles desires to take the rule he may have it, not so much on the doubt the court entertains, as from the importance of the question, and there having been undoubtedly a view taken by the learned Judge which I believe he does not now entertain. But if Mr. Knowles thinks it worth while to have the matter more fully discussed, the court will certainly grant a rule for that purpose. Knowles, Q.C.—If your Lordship pleases, I will take the rule. Whether we proceed on it will depend upon consideration. Pollock, C.B.—I think it right not to grant you the rule without distinctly stating to you that it does not so much arise out of the doubt the court entertains as the doubt which undoubtedly the learned Judge who tried the cause did entertain at the trial and after the trial, and also on account of the importance of the question, and the general matters connected with it, and the general administration of justice upon the statute. Knowles, Q.C.—I will keep in mind what the court has said, and whether your Lordship hears anything more of it or not will depend upon consideration afterwards." It would seem that the rule was not proceeded with, as the case is noted a month later as "struck out." The Judge who had tried the case was Crompton, J. He spoke of it during the argument of *Chapman v. Bothwell*, the following year. His remarks are thus reported in 4 Jur. N. S. at p. 1181: "*Bramall v. Lees* (tried before me at the Spring Assizes at Liverpool in 1857),

which was an action by the father for the death of a girl aged twelve years, who was at the time of her death supported by her father, but, it was said, would, in the course of a year or two, have gone to work in a factory and earned wages, a verdict was given for the plaintiff for £15. On a rule for a new trial being moved for, the Court of Exchequer, after a good deal of consideration, were of opinion that a rule ought not to be granted. The Lord Chief Baron said that they would not have granted it if the Judge at the trial of the cause had not expressed a doubt, but at the end of the discussion I was satisfied. The rule to show cause was granted, but was not pressed." The same learned Judge again referred to the case in the course of the argument in *Pym v. Great Northern R. W. Co.*, 2 B. & S., at p. 763.

We have in *Franklin v. Southeastern R. W. Co.*, 4 H. & N. 211, decided in May, 1858, another judgment delivered by Pollock, C.B., which goes farther than any of the earlier cases towards a definition of the pecuniary loss in respect of which damages are recoverable under the statute. The plaintiff there sued in respect of the death of his son, who had assisted his father by doing some of his duty as light porter at St. Thomas's Hospital, for which duty the father was paid 3s. 6d. a week. The son earned wages at another employment, but was not shown to have contributed from them to his father's support. Bramwell, B., left it to the jury to say whether the plaintiff had a reasonable expectation of any, and what pecuniary benefit from the continuance of his son's life. The propriety of that charge was discussed *in banc*, and Pollock, C.B., delivering the judgment of the court, said: "The statute does not in terms say on what principle the damages are to be assessed; and the only way to ascertain what it does is to show what it does not mean. Now, it is clear that damage must be shown, for the jury are to 'give such damages as they think proportioned to the jury.' It has been held that these damages are not to be given as a solatium, but are to be given in reference to a pecuniary loss. That was decided for the first time *in banc* in *Blake v. The Midland R. W. Co.*, 18 Q.B. 93. . . It is also clear that the damages are not to be merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and, if so, to what extent, were the questions left to the jury. The



proper question then was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and in fact he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that actual benefit should have been derived; a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him. On the other hand, a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit which might have been reasonably expected from the continuance of the life."

*Dalton v. Southeastern R. W. Co.*, 4 C.B. N. S. 296, was decided within a day or two of Franklin's case. That was also an action by a father as administrator to recover damages for himself and his wife for the death of their son. The deceased, who was earning good wages, had for seven or eight years been in the habit of visiting his father and mother, who were laboring people, once a fortnight, and taking them presents of tea, coffee, sugar, meat, etc., which, with occasional donations of money, averaged about £20 a year. There was a verdict for £80 for the father, and £40 for the mother, and a separate sum for funeral expenses and mourning. The latter sum was disallowed, and the verdict sustained as to the others; the judgment in Franklin's case, which the court said was decided with their entire concurrence, being treated as disposing of the question.

*Chapman v. Rothwell*, 11 Jur. N. S. 180, decided in the Queen's Bench at the end of 1858, is the first reported English case in which the death of a wife was the cause of action. The plaintiff, her husband and administrator, claimed £200 damages in his declaration without averring pecuniary damage. There was a demurrer on that ground, which was overruled by the court, consisting of Lord Campbell, C.J., and Wightman, Erle, and Crompton, JJ. No formal judgment is reported, but from remarks made during the argument it is probable that the decision was merely that no averment of pecuniary damage was necessary in the pleading, the damage being a matter of evidence only.

In *Duckworth v. Johnson*, 4 H. & N. 653, decided in June, 1859, we have judgments delivered by Pollock, C.B., and by Barons Martin, Bramwell, and Watson, affirming the doctrines laid down in *Franklin v. Southeastern R. W. Co.* and applying them to the case of a father who recovered £20 damages for the death of a son fourteen years of age, who was not, at the time of his death, in any employment, but who had for two years and a half earned 4s. a week at Manchester, the father living at Liverpool. The learned judges all agreed that if no damage were shown a

verdict for nominal damages could not be sustained, and that actual damage must be shown; but they all interpreted that phrase by holding that evidence of a prospect of benefit sufficed; and, further, that there need not be evidence given that the value of the boy to his father would be more than the cost of maintaining him, that being a matter of which the jury were able to judge. I do not stop to quote the remarks made, although they are instructive.

*Cotton v. Wood*, 8 C. B. N. S., 568, decided in 1860, deserves particular notice, because it was an action brought by the plaintiff as administrator of his deceased wife for an injury which resulted in her death. The only thing in question before the court *in banc* was the proof of the negligence of the defendant. That was the only ground on which the verdict was attacked; and the verdict was for £25, which was distributed; £10 to the plaintiff himself, and £15 for three children of the plaintiff and of the deceased. It was proved on the part of the plaintiff, that the deceased had by her industry contributed, to the extent of about 10 shillings weekly, towards the maintenance of the family. This is all the reported evidence on which the damages were estimated.

*Pym v. Great Northern Ry. Co.*, 2 B. & S. 759; 4 B. & S. 396, is an important case by reason of the further elucidation afforded by the judgments delivered of grounds on which estimates of pecuniary damage may be based, and because in it a court of error expressly affirmed the principle on which the statute was construed in the earlier cases. Unlike most of the earlier reported cases in which the parties seeking compensation had been persons in humble life, and in several of which verdicts for comparatively small sums of money had been held to be excessive, this case related to the death of a gentleman of large income, derived from an estate which upon his death passed by entail to his eldest son. By a settlement, a jointure of £1000 a year had been settled on his wife, and £20,000 had been secured to the younger children on his death. He left eight younger children, all under twelve years of age. The jury awarded £1000 to the wife and £1500 to each of the eight younger children. Those amounts the court considered excessive, having regard to the acceleration by the death of the enjoyment of the moneys settled upon the wife and children, and plaintiff's counsel assented to a suggestion by the court, to reduce the sums awarded to the children to £1000 each. It was expressly decided that the condition that the action could have been maintained by the deceased if death had not ensued, had reference, not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of, and therefore the personal representative could maintain an action for pecuniary loss, although that pecuniary loss would not have resulted from the accident to the deceased if he had lived. Also that "as

the benefit of education and the enjoyment of the greater comforts and conveniences of life depend on the possession of pecuniary means to procure them, the loss of these advantages is one which is capable of being estimated in money; in other words, is a pecuniary loss." "We are not insensible," Cockburn, C. J., observed, "to the argument *ab inconvenienti*, founded on the very serious consequences which might ensue to a railway company in the event of a fatal accident happening from negligence to an individual of very large fortune; but we think this is rather for the consideration of the legislature, as to whether any limit should be put to the liability, than for us. We see no difference in principle between such a case as the present and that of a claim by the family of an artisan for the loss of the advantages arising from the father's earnings, in which case it is not doubted that the action may be maintained."

The judgment of the Court of Exchequer Chamber, delivered by Erle, C. J., affirmed that of the Queen's Bench on all the points.

In *Boulter v. Webster*, 13 W. R. 289 (1865), the jury found that the father, who was plaintiff, had not sustained any pecuniary damage by the death of the child who had been killed by the careless driving of the defendant's servant. It was argued in the Queen's Bench that a verdict for nominal damages might be entered; but the court held that could not be done under this statute, the law not implying damage.

In *Springett v. Hall*, tried also in 1865, we have an instance of a new trial granted because the damages were too small. The report in 4 F. & F. 472, of the trial before Cockburn, C.J., informs us that damages were assessed at 40s. a verdict, which the Lord Chief Justice characterized as being very unsatisfactory and evidently the result of a compromise. By a note in *Fisher's Digest* it appears that the 40s. was distributed, £1 to the widow and 10s. to each of the children, and that a new trial was ordered on the ground that the jury had shrunk from deciding the issue. The reference given is 6 B. & S. 477, but I do not find the case in that volume.

I am indebted to my brother Burton for a reference to *Chant v. Southeastern R. W. Co.*, noted in the *Weekly Notes* for 1866 at p. 134. That was an action by a gentleman's gardener for the death of his wife. Owing to the plaintiff, who was the only witness on this part of the case, breaking down in the course of his examination, no evidence was given of the pecuniary loss sustained by him in the loss of his wife, but the jury found a verdict for £200. This was moved against in the Exchequer Chamber only on the amount of the damages, and it was urged in support of the rule that there was no evidence as to the pecuniary assistance rendered to the plaintiff by his wife. But the court thought that,

in the absence of evidence to the contrary, it must be assumed that she was a person of average health, industry, and good character; that to a poor man such a wife gave a pecuniary assistance in keeping house, etc.; and they declined to grant a new trial on account of excessive damages.

In *Read v. Great Eastern R. W. Co.*, L. R. 3 Q. B. 555 (1868), an action by a widow to recover damages for the death of her husband, it was held that the action was answered by a plea of satisfaction to the deceased in his lifetime; because the party injured could not, in the words of the statute, "maintain an action in respect thereof," after having received satisfaction.

There have been several cases in which the statute has been applied in proceedings *in rem* in the High Court of Admiralty. In three of these, which happen to come in this place in the chronological order I am pursuing, questions of some interest respecting the parties contemplated by the statute were decided. In *The Guldaxe*, L. R. 2 A. & E. 325 (1868) the action was successfully maintained against a foreign ship owned by foreigners. In *The Explorer*, L. R. 3 A. & E. 289 (1870), the persons in respect of whose death damages were recovered were aliens and not British subjects; and in *The George and Richard*, L. R. 3 A. & E. 466 (1871), it was adjudged that a child *en ventre sa mère* was entitled to compensation for the death of its father.

*Rowley v. London and Northwestern R. W. Co.*, L. R. 8 Ex. 221, which was before the Exchequer Chamber in 1873 on a bill of exceptions, is a case which ought to be referred to as laying down important principles concerning the mode of measuring damages, and the extent to which annuity tables may be legitimately resorted to, but contains nothing more directly touching our present inquiry.

I ought not to pass without notice, in its order, a case which I shall have occasion to refer to again,—*Osborn v. Gillett*, L. R. 8 Ex. 88 (1873).—although it was not an action under Lord Campbell's Act, particularly as it was referred to in the court below. The plaintiff claimed damages for the death of his daughter and servant, caused by the negligent act of the defendant's servant, whereby the plaintiff lost the benefits and advantages which would have accrued to him from her services, and was put to expense in conveying her body to his house, and in respect of her burial. One plea was, that the deceased was killed on the spot, so that the plaintiff did and could not sustain any damage which entitled him to sue in this action for the acts complained of. To this there was a demurrer. It is not stated why the action was not brought under Lord Campbell's Act. It could not have been maintained under that act for the funeral expenses. That had been decided in *Dalton v. The Southeastern R. W. Co.*, 4 C. B. N. S. 296, and again in *Boulter v. Webster*, 13 W. R. 289. And that the plaintiff may

have been well advised in attempting to assert a right to damages at common law is apparent from the judgment in which Bramwell, B., with his accustomed force and ability, maintained that right against the opinions of Kelly, C. B., and Pigott, B. Lord Campbell's Act was brought into the discussion for the sake of the argument afforded by the declaration in the preamble that "no action at law is now maintainable against a person who, by wrongful act, neglect, or default, may have caused the death of another person;" and by the omission of master from the list of persons for whose benefit the new remedy was given to the personal representative. But I do not think there is anything to be gathered either from the form of the action, or the language of any of the judges who took part in the decision, that can fairly be regarded as bearing at all directly on the question now before us.

*Bradburn v. Great Western R. W. Co.*, L. R. 10 Ex. 1 (1874), was an action by a person injured, in which the defendants claimed to set off against the damages a sum received by the plaintiff on an accident policy. In rejecting this claim, the difference was pointed out between this case where the insurance money was paid in pursuance of a contract, and in consideration of premiums paid by the plaintiff, and a case like *Hicks v. Newport, etc., R. W. Co.*, 4 B. & S. 403, note, where the claim was under Lord Campbell's Act, and the insurance money came to the claimants by reason of the death, making them to that extent gainers by the event.

The cause of action in *Potter v. Metropolitan R. W. Co.*, 30 L. T. N. S. 765 in Q. B., and 32 L. T. N. S. 36, in the Exchequer Chamber, arose from injuries sustained by a wife, but Lord Campbell's Act was not in question. The curious feature of the case was that the wife herself, as executrix of her husband, brought the action. The point decided was that the cause of action, being for breach of a contract to carry safely, survived. The same point was again decided shortly afterwards in *Bradshaw v. Lancashire & Yorkshire R. W. Co.*, L. R. 10 C. P. 189, the injury there having been to the testator himself, occasioned by a breach of contract by the defendants, and which injury ultimately caused his death. Lord Campbell's Act was noticed in the judgments of Grove and Denman, JJ., but only for the purpose of showing that nothing in it prevented this action being maintained by the executor for damage to the estate. This decision was questioned by Mellor, J., in *Leggott v. Great Western R. W. Co.*, 1 Q. B. D. 599, but was nevertheless followed by him and Quain, J., who held that in that action, which was brought by the administratrix for injury to the personal estate of the deceased by the accident which caused his death, the defendants were not estopped from denying alleged facts connected with the accident, by their unsuccessful defence of a former action brought by the same plaintiff as administratrix,

under Lord Campbell's Act, for the benefit of herself, as his wife, and of his children.

*Pulling v. Great Eastern R. W. Co.*, 9 Q. B. D. 110, was an action by an administrator to recover for medical expenses incurred by the deceased in consequence of the accident, and before his death. The reporter points out in a note that the facts did not bring the case within Lord Campbell's Act, an observation probably suggested by the cases to which I have alluded when noticing *Osborn v. Gillett*. The decision was that as the action was founded on tort and not on contract, the principle of *Potter v. Metropolitan R. W. Co.*, and *Bradshaw v. Lancashire & Yorkshire R. W. Co.*, did not apply to enable the plaintiff to recover.

*Sykes v. Northeastern R. W. Co.*, 32 L. T. N. S. 199 (1875), is on the question of damages. The son, for whose benefit the action was brought by the father, had worked for his father for wages. It was held by Brett and Grove, JJ., that there was not evidence of pecuniary loss, and they therefore set aside a verdict rendered for £70, of which £20 had been allowed for funeral expenses. Brett, J., said: "There is no evidence that the plaintiff received any pecuniary benefit from the continuance of his son's life. The son was of full age and worked for fair wages, the arrangements between father and son being purely matters of contract;" and Grove, J., said: "Lord Campbell's Act was intended to compensate for the loss of a pecuniary benefit which had been derived from relationship to the person killed by the negligence of another. In *Franklin v. Southeastern R. W. Co.*, 3 H. & N. 211, the father was old and infirm, and the son assisted him in earning wages from motives of filial affection. Here the father paid the son the ordinary wages, and there is nothing to show that the son would not have left off working for his father if he could have got better wages from anybody else."

In *Hetherington v. Northeastern R. W. Co.*, 9 Q. B. D. 160, the county court judge had nonsuited the plaintiff, but it was held by Field and Cave, JJ., that there was some evidence of pecuniary damage to go to the jury. The evidence is set out and is very short. It was that of the plaintiff, and is thus noted: "The deceased was my son; he was twenty-nine years old; he gave me a portion of his earnings when I wanted it; I am nearly blind and am injured in my leg and hands; my son used to contribute to my support; I am not so able to work as I used to be; I am fifty-nine; my son was not married. Cross-examined—Five or six years ago I was out of work for six months, and my son was very kind to me and helped me. Re-examined—He was always kind to me; I have never had money from him since."

*Griffiths v. The Earl of Dudley*, 9 Q. B. D. 357, decided that a contract by a workman with his employer, not to claim compensation for injuries under the Employers' Liability Act, 1880, bound

the widow suing for damages under Lord Campbell's Act, the principle being the same acted on in *Read v. Great Eastern R. W. Co.*, L. R. 3 Q. B. 555.

In *Wilkins v. Day*, 12 Q. B. D. 110, in which case a husband recovered £100 damages for the death of his wife, the only question related to the obstruction of the highway by which the fatal accident was occasioned.

My immediate object, which is to follow the chain of English decisions upon Lord Campbell's Act, does not necessarily require any reference to cases decided in the Irish courts. I may, however, refer to three of such cases, the reports of which I have seen. *Condon v. Great Southern & Western R. W. Co.*, 16 Ir. C. L. R. 415 (1866), was decided in the Exchequer. A son, aged fourteen, who had never earned any wages, but whose capabilities were valued at 6d. a day, lost his life by the negligence of the defendants. The probability that he would have enabled his mother to earn more, or would have devoted part of his earnings to his mother's support, was held to be evidence to go to the jury upon the question of damages, and it was held that the probability was increased by the past filial conduct of the deceased. This is the statement of the head-note. The court professed to follow, and did follow, the rule settled by English cases, the Chief Baron saying that it was established by a series of decisions, first that in such an action the damages must be estimated with reference to pecuniary loss alone; and, secondly, that in estimating such pecuniary loss the jury are to consider, when the evidence warrants their so doing, the reasonable probability of pecuniary benefit accruing to the party claiming the damages, if the death of the deceased had not occurred. He also, in noticing an argument urged at the bar, gave it as the opinion of the court that there was no analogy between the small amount of service which may be sufficient in many cases to save a plaintiff from nonsuit in an action of seduction and the pecuniary loss which must be proved in an action on Lord Campbell's Act. In another Irish case to which I am about to allude, similar language was used. If what the learned Chief Baron meant was that the pecuniary loss for which alone a plaintiff under Lord Campbell's Act can recover damages is to be estimated on a very different principle or theory from the exemplary or sentimental damages allowed to be given in an action of seduction, he merely laid down the law as settled by *Blake v. Midland Counties R. W. Co.*, 18 Q. B. 93, and invariably accepted ever since. But if he meant that proof of acts of service, such as would suffice as evidence to avert a nonsuit in an action of seduction would not be sufficient to leave to the jury as evidence of the probability of pecuniary advantage from the continuance of life, I think the proposition must be understood to relate only to cases where the only evidence to found an estimate of future probabilities consists of

proof of services actually performed. Such cases may occur, though I should imagine but rarely.

The other two Irish cases lay down a rule which cannot be reconciled with that acted on in the English cases in which the plaintiff has recovered damages for the loss of a child who had never during its life been a source of profit, but may have always been a burden, and which is, I think, equally at variance with that on which the verdict in Condon's case was sustained. It will further be noticed that the language of the judgments indicates that the English cases of this class had not been brought to the attention of the Court.

*Bourke v. Cork & Macroom R. W. Co., Ir. R. 4 C. L. 682* (1879, was an action by a father for the death of his son, aged 14, who had been above the average in attainments, and had received special training and education at school to fit him for mercantile pursuits, and who would probably have remained for a couple of years longer. He was very strong and healthy, and a good, well-conducted, industrious boy. The plaintiff was a spirit-grocer and general merchant, and had the management of the local postal and telegraph office. He was carrying on a good business and in a respectable and comfortable position. In vacation-time the deceased sometimes looked after the assistants in the plaintiff's shop, but received no wages. He was also occasionally employed in sending out telegrams, and was learning the telegraph instrument. He was also sometimes useful on the plaintiff's farm. The plaintiff deposed that his son, when he reached 16, would have been put into the shop, where his services would have been worth £20 a year; and that when he attained 21 his services would have been worth £100 a year. The plaintiff, on cross-examination, stated that when his son was at home for his vacation he kept him out as much as possible, and gave him as much amusement as he could; and that he carried on his business without assistance from his son all the year round. It was held that there was no evidence of reasonable expectation of pecuniary benefit, Palles, C. B., saying that he was not aware of any case in which a plaintiff recovered damages where he or she had not been actually benefited by the child. "Many of the cases," he said, "established that if there be this actual benefit the jury are not limited in the amount of damage to the benefit which actually was conferred, but may estimate the value of similar benefits which might reasonably be expected to have been conferred during the continuance of the life. But I am aware of no case in which, where no benefits had been conferred, a verdict for the plaintiff was sustained." Fitzgerald, B., concurred, and so also did Dowse, B., who added: "I am inclined, however, to go further than he (the C. B.) has done, and to hold that in a case of this description the plaintiff must fail, unless he establishes, by evidence, that there was in existence at the time of



the death of the son, a state of facts in connection with him out of which pecuniary advantage arose, or had formerly arisen, and was likely to again arise to the father, and the continuance or renewal of which pecuniary advantage the father might have reasonably expected had his son not been killed. . . . I think it the duty of this Court to take care that actions under Lord Campbell's Act do not become like actions of seduction, in which, on the question of loss of service, fiction has taken the place of fact."

In *Holleran v. Bagnell*, Ir. R. 6 C. L. 333 in C. P. D., Morris, C. J., again enunciated the rule that there must be definite evidence of pecuniary advantage in existence prior to or at the time of death, and this advantage must be a benefit to the plaintiff." There certainly was more reason in this case than strikes one as having existed in *Bourke's Case* for setting aside the plaintiff's verdict, because the child killed was a girl of only seven years of age, who had never done more than any such child always does in her home; and therefore the decision did not necessarily rest on the rule laid down by the Chief Justice.

The doctrine thus adopted by the Irish Courts may, I think, be fairly stated as being that no injury, within the contemplation of Lord Campbell's Act, can result from the death of one from whom no benefit had been received during his life. This is so far opposed to the tenor of all the English cases, and to the express decision in some of them, that it is obviously useless to look to the judgments of the Irish Courts for assistance while we take those of the English Courts as our guide.

It may be truly said of the English decisions to which I have adverted that there is through them all the same principle of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the Act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefit of the statute cannot be claimed.

No case is precisely on all-fours with the present, so far as its facts appear, and there is certainly none by which it is expressly decided that claims like those we are dealing with cannot be maintained, nor is there any expression to be found, or any dictum, intimating that a claim in respect of the death of a wife or mother is to be judged by different rules from those applied to the loss of a husband, or father, or son.

We find no hint of such a construction of the law in such reports as we have of cases in which the death of a wife has been the cause of action.

The idea is not suggested by the language of the statute.

"Parent" is the word used to describe mother as well as father; "child" includes girls as well as boys; and the husband's right is given by the same words which enable a wife to recover.

There can be but one question: Is there before us evidence proper to be left to the jury that injury resulted to the husband of the late Mrs. Lett, and to her younger children, or to the husband or to the children, from her death?

We have one thing very definitely settled—namely, that the injury intended by the Statute is not of the character of wounded feelings or affections or mental suffering. And Judges, while clearly distinguishing the kind of injury which is not intended, have given a kind of definition of what, in their view of the act, is intended, and in so doing have adopted the word "pecuniary." Whether they call it "pecuniary injury" or "pecuniary loss," or contrast it with "pecuniary advantages," "pecuniary benefits," or benefits of which a "pecuniary estimate" can be made, the word "pecuniary" is used as the distinguishing term.

I dare say no better word could have been chosen; but there is apt to be danger, when a new phrase is substituted for the words of a statute, of addressing our criticism to the interpretation of the supposed verbal equivalent instead of the language of the statute itself. I think this danger has not always been avoided in the present instance. Argument sometimes takes the direction of maintaining, not that the injury in question is merely sentimental and therefore outside of the statute, but that it is not "pecuniary" because there was to be no handling of money, and is therefore not within the statute. I do not think the word "pecuniary" is used in this restricted sense; but if it is, it is the wrong word. The principle of *Blake v. Midland Counties R. W. Co.*, 18 Q. B. 93, and the other cases, is that the statute is meant to give compensation not for mental injuries, but material ones, loss of money or money's worth in a material and not in a sentimental sense. There is no decision which, rightly understood, proceeds, in my opinion, upon a different understanding of the right given by the statute. On that principle it has with great uniformity been applied, in the cases I have cited, to claims by parents for the loss of children, by wives for the loss of husbands, and by children for the loss of their father.

There is no reason indicated by the statute why it should not be applied in precisely the same way when the husband claims in respect of the loss of his wife, and the children for the loss of their mother.

As far as the reported cases indicate, it has, without question, been so applied.

I have referred to four English cases of the kind: *Chapman v. Rothwell*, 11 Jur. N. S. 1180, which may not have afforded an op-

WOUNDED FEELINGS NOT AN ELEMENT OF DAMAGE FOR CAUSING DEATH.

BUT PECUNIARY INJURY IS NOT NECESSARILY A MONEY INJURY.

portunity for raising the question ; *Cotton v. Wood*, 8 C. B. N. S. 568, where there clearly was the opportunity ; as there was also in *Chant v. Southeastern R. W. Co.*, W. N. 1866, p. 134, and, as far as we can perceive, in *Wilkins v. Day*, 12 Q. B. D. 110.

The damages in *Cotton v. Wood* were awarded in separate sums to the husband and children. The verdict was moved against, but not on this ground. If pecuniary injury means only the loss of money which would have come into one's pocket, it may of course be said that Mrs. Cotton earned 10s. a week ; but there is not a word in the report to indicate that the decision would not have been the same on proof that she rendered to her husband valuable service in another form, as by saving money, or doing such things as the wife in *Chant's* case was assumed to do, and which another would not do without being paid. But the money was in law the husband's. It cannot weaken the authority so far as it touches the question of the children's share of the damages.

Legal right forms no consideration in these discussions. That is another point definitely settled by the decisions. That children dependent upon their father, or receiving benefits from him, could recover for his death no one disputes. For father substitute widowed mother, and it must be conceded that the law is the same. On what principle can a distinction be founded on the circumstance that the mother was not a widow ? No distinction can be urged on any idea of legal rights or relations, for the benefits conferred by the statute do not depend on legal claims on the bounty of the deceased.

I have not been able to perceive any substantial distinction between the benefits which a man's children could reasonably expect from the continuance of his income if expended by himself as pointed out in *Pym v. Great Northern R. W. Co.*, 2 B. & S. 750, 4 B. & S. 396,—namely, education and social advantages,—and the same benefits, or benefits of the same class, though perhaps less in extent, conferred by a father who employed his leisure in himself educating his family, or by a mother who rendered similar services. Nor do I see in what particular the claim of a wife for the loss of a husband who, as bread-winner for his family, provided the supplies for his household, differs from that of a husband for the loss of a wife whose housewifery gave those supplies additional value.

I do not overlook the fact that a great variety of considerations must enter into the estimate of the loss by the death of wife or mother ; some of these were dwelt upon in the court below, and possibly influenced the decision there by reason of the difficulty apparently inseparable from the inquiry. The character of the influence likely to be exercised by her over her children ; the possibility, not always hypothetical, that their best interests might be better advanced by a stranger ; on the part of a husband, the probability of his widowhood being of short duration ; and many other

such considerations would unavoidably present themselves. But similar contingencies have to be taken into account, no matter which of the relationships enumerated in the statute happens to be in question. In fact, the objection recalls the anomalous state of the law before the statute, which is justly denounced as a reproach to our jurisprudence, when, because of the infinite value placed on human life, no damages at all were given for its destruction.

It is, no doubt, the duty of the courts to restrain jurors, as far as may be practicable, from awarding damages in excess of those proportioned to the injury for which damages are properly assessable; and the courts have, as a rule, been vigilant in this respect. We have, amongst the cases I have cited, several in which verdicts of no great magnitude were set aside as excessive. I have not always noted this circumstance when referring to the cases. We have examples of the same kind in our own courts; *e.g.*, *Secord v. Great Western R. W. Co.*, 15 U. C. R. 631; *Morley v. Great Western R. W. Co.*, 16 U. C. R. 504; *Hutton v. Corporation of Windsor*, 34 U. C. R. 487, and other cases. But the liability of the power given by the statute to be abused cannot afford a valid argument against its legitimate exercise.

At common law a husband could maintain an action for the loss of his wife's services caused by the tortious act of another (Add. on Torts, 4th ed., p. 922), but he could not sue for the total deprivation of those services consequent on her death. *Baker v. Bolton*, 1 Camp. 493: "In a civil court," Lord Ellenborough told the jury in that case, "the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence."

This sentence expressed the anomaly which Lord Campbell's Act was passed to remove. It did not remove it in all cases, one case omitted being that of master and servant, as was pointed out in the judgment in *Osborn v. Gillett*, L. R. 8 Ex. 88, already cited. But one case included is that of husband and wife, and the consequence of that is that the law laid down by Lord Ellenborough in *Baker v. Bolton*, 1 Camp. 493, ceased, on the passing of that act, to be a reproach to English jurisprudence so far as it restricted the husband's remedy for the loss of his wife's services to the period which happened to intervene between the injury and her death. Under the statute he acquired a right to damages of the same character, in consequence of her death, as at common law he could have recovered when they were caused by an injury which disabled but did not kill her.

The judgments delivered in *Osborn v. Gillett*, L. R. 8 Ex. 88, bear out this proposition. Damages were sought in that action for the death of the daughter and servant of the plaintiff. The action was not under Lord Campbell's Act; and hence the common-law right of master and servant was all that was in question. *Bram-*

well, B., held that the action lay ; but Pigott, B., and Kelly, C. B., held the contrary, relying upon *Baker v. Bolton*, and upon the inference founded on Lord Campbell's Act, which recited the law as it had stood, and then gave the new remedy to a limited class of persons. "The result is," Pigott, B., said, "in my opinion, that we are not at liberty to disregard the law thus established so long ago, and expressly recognized by the legislature, nor in effect to add, by the decision of this court, another clause to Lord Campbell's Act ;" and Kelly, C. B., concludes his judgment by saying : "Such, then, being the state of the authorities, I agree with my brother Pigott that we must leave it to the legislature to provide for a case like this, and that we ought not to take it upon ourselves to create a new cause of action, which would be to make and not to expound the law."

Had the case been for loss of the services of a wife caused by her death, the exposition of the law as enunciated in these judgments, and under the statute which did give a cause of action to the husband while it stopped short of giving it to the master, must have been as contended for by the present plaintiff.

Now, bearing in mind that the right of action under the statute does not depend on the legal rights existing between the claimants and the deceased, as has been more than once decided, we can apprehend the effect of the view I have just put, as illustrating one kind of injury for which the statute gives a remedy,—namely, loss of service ; an injury not resulting from the legal right of the husband to the services of his wife, but simply from deprivation of the benefits which would have been enjoyed or might reasonably have been expected to result from those services, and therefore incident upon the children as well as upon the husband.

DEPRIVATION OF  
BENEFIT OF WIFE  
KILLED MAY BE  
AN ELEMENT OF  
DAMAGE, AL-  
THOUGH NOT  
MEASURABLE IN  
MONEY.

Benefits of that nature are of substantial value, and must be classed as "pecuniary advantages," if that term is comprehensive enough to include what, if my argument is sound, is clearly within the intention of the act. If the term is not sufficiently comprehensive, then, as I before remarked, a better word ought to be chosen.

There has never been any hesitation in recognizing the right of a parent to recover under the statute for loss of the services of a child, or of a child or a wife to recover for the loss of the services of a father or husband. The right now asserted is placed by the statute on precisely the same footing ; and I have not been able to see, from any point of view, any satisfactory reason for questioning the right either of the husband or the children of Mrs. Lett to recover for the loss of the services reasonably to have been expected from her if her life had been continued.

The amount of the damage is not complained of. I think the judgment of Mr. Justice Armour, in the court below, puts the ap-

plication of the statute to the facts of this case upon the proper footing, and that we should allow the appeal, with costs.

GALT, J.—After the best consideration I have been able give to the law, as laid down by the numerous cases cited in the court below, and by my learned brothers, it appears to me that in actions under Lord Campbell's Act the right of the administrator to recover is based, not on the mental suffering, but on the material loss sustained by the persons on whose behalf the suit is brought. If I am correct in this view, surely a husband suffers a material loss by the death of his wife; and, if so, the amount of that loss is to be settled by the verdict of a jury.

In the case of *Wilkins v. Day*, 12 Q. B. D. 110, which is the last I have seen, the right of the husband was not even questioned. There was no evidence whatever of what may be called "pecuniary" as distinguished from "material" loss. As respects the children, there can be no doubt they sustain a material loss by the death of their mother. The amount of that loss is a question for the jury. It does appear to me to be an extraordinary state of the law to say that if a parent is rich the children sustain no loss because they inherit their mother's wealth, and if she is poor they have no claim, because she had nothing to bequeath. In my opinion, the appeal should be allowed.

ROSE, J.—The question for decision is, can a husband and his children recover damages against the defendants for the negligent killing of the wife and mother—she at the time of death being engaged as a prudent woman in taking sole charge of the household and housework, and disbursing to the best advantage the income earned by her husband, and looking after the physical, mental, and it may be moral wants of her children?

Have the husband and children, or any of them, sustained any injury within the meaning of Lord Campbell's Act?

There is no adverse decision directly in point.

It is said there is no decision in favor of the plaintiffs.

It has been objected that if the decision is in favor of the plaintiffs it will be adding another clause to the act. If this is so, the plaintiffs must fail.

It is, however, not quite accurate to say there is no decision in the plaintiffs' favor, as will more fully appear. The words of the second section of the act are, "that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury

MATERIAL LOSS,  
NOT MENTAL SUFFERING,  
IS BASIS OF RECOVERY  
UNDER LORD CAMPBELL'S ACT.

QUESTION  
STATED.

STATUTE AND  
AUTHORITIES EXAMINED.

may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."

These words are also found in the third section of ch. 128 R. S. O.

It will be observed that the persons to whom a right of action is thus given are those who stand in such relation to the deceased as might naturally and reasonably enable them to expect assistance in any hour of necessity.

The claim in many of the cases would be founded entirely upon affection; in hardly any could it be said to be a legal claim, *i.e.*, one that could be enforced by legal proceedings.

The word "injury" alone would certainly be broad enough to include most cases, but it received a limited meaning by judicial interpretation.

It was held in *Blake v. Midland*, 18 Q. B. 93, not to include "mental sufferings." This was the decision in that case. In reaching the conclusion the court expressed the opinion that the damages must be "confined to injuries of which a pecuniary estimate may be made;" and this opinion may be said to be the ground for the conclusion, for it is stated, "as the damages certainly exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive."

It is clear that the court were more concerned to exclude a solatium for mental sufferings than to give a comprehensive definition of all cases within the statute.

In the next case of *Franklin v. Southeastern R. W. Co.*, 3 H. & N. 211, the court held the father (plaintiff) entitled to recover £75 for the negligent killing of his son by the defendants. The son was of age, earning his own wages. It is not said that he was living at home with his father, or that his father derived any pecuniary assistance from him; the only assistance he received was that he, plaintiff, being light porter at St. Thomas's Hospital, and in the habit of carrying up coals to the wards of the Hospitals, for which he was paid 3s. 6d. a week, and being ill, his son "had for some time past carried up the coals for him."

The learned Judge, Bramwell, B., left it to the jury to say whether the plaintiff had a reasonable expectation of any, and what, pecuniary benefit from the continuance of the son's life.

On a motion to enter a nonsuit, the judgment of the court was delivered by Pollock, C. B. (it is not said who were sitting, but the members of the court at the time were Pollock, C. B., Martin, Bramwell, Watson, and Channel, BB.). The Chief Baron said: "The statute does not, in terms, say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed, and the only way to ascertain what it does is to show what it does not mean."

This, as I have pointed out, is apparently what the court were

endeavoring to do in *Blake v. The Midland R. W. Co.*, 18 Q. B. 93. He adds: "It is also clear that the damages are not to be given in reference to the loss of a legal right, for they are to be distributed among relations only, not to all individuals sustaining such a loss; and, accordingly, the practice has been to ascertain what benefit could have been enforced by the claimant had the deceased lived, and give damages thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except they should be calculated in reference to a reasonable expectation of a pecuniary benefit as of right, or otherwise from the continuance of the life. . . . The proper question, then, was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and, in fact, he had so assisted him to the value of 3s. 6d. a week. We do not say that actual benefit should have been derived; a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father being not in need the son had never done anything for him. On the other hand, a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit which might have been reasonably expected from the continuance of life."

This case shows the opinion of the court to have been that:

1. The claim is not based on loss of a legal right; good-will and affection are its supports.
2. It must not be founded on injury to the feelings.
3. It must be founded on pecuniary loss.
4. The damages must be calculated in reference to a reasonable expectation of pecuniary benefit.
5. It is not necessary to show any benefit actually received;
  - . Or a present need of assistance;
  - 7. Or a certainty of future need.
8. Evidence of good-will is evidence upon which a reasonable expectation may be founded.
9. Assistance in performing labor, the remuneration for which goes to the claimant, is pecuniary assistance.
10. Certainty of permanent pecuniary resource on the part of the deceased need not be proved. Wages and ability to earn them at the time of death constituted the evidence in this case.

In *Dalton v. Southeastern R. W. Co.*, 4 C. B. N. S. 296, Willes, J., speaks of *Franklin v. Southeastern R. W. Co.*, being decided "with our entire concurrence."

*Duckworth v. Johnston*, 4 H. & N. 653, lays down no new principle, but is interesting as illustrating the right of a jury to estimate damages without distinct evidence of value, drawing on their own common judgment to supply the requisite information. The evi-



dence disclosed that the deceased son was earning 4s. a week which went into the common fund; that the father bore the expenses of his board, clothes, etc. No evidence was given as to the cost, which must of course be deducted to ascertain the loss sustained. Pollock, C. B., said: "But as to that the jury were better able to judge than we." Martin, B.: "It was argued that it ought to have been proved that the cost of boarding and clothing the boy did not exceed 4s. a week; but that was a question for the jury to determine."

In *Bramall v. Lees*, 29 L. T., pp. 82, 111, 166, a verdict in favor of the father was sustained. The deceased was twelve years of age—living at home—getting nothing, and pecuniarily a burden to her parents. It was said she might, in the course of a year or so, have gone to work in a factory near by, and taken back money as her earnings for the parents. The verdict was for £15. Pollock, C. B., having intimated to counsel for defendant that the court entertained no doubt about the plaintiff's right to hold his verdict; the rule, although granted, was not taken out.

This case adds the further proposition which may be numbered.

11. The fact that the deceased was, at the time of death, a recipient of benefits, and could not be capable of rendering any assistance for some considerable time, does not entitle defendant to have the case withdrawn from the jury.

This case further illustrates the impossibility of laying down any exact rules to guide juries in the ascertainment of the amount of damages.

*Pym v. The Great Northern R. W. Co.*, 2 B. & S. 759, is fully digested by Mr. Justice Armour in the court below. It gives an additional direction to the jury. On the trial Lord Chief Justice Cockburn told the jury that they "might take into consideration the loss of the advantages of superior education, social position, and personal comfort, of which the father's income, had he lived, would have secured the benefit and enjoyment to the family," etc. The same learned Chief Justice, in giving the judgment of the court on motion to enter verdict for defendants or nonsuit, said that "the loss of these advantages is one which is capable of being estimated in money;" in other words, as a pecuniary loss.

Proposition 12 may be stated thus:—The loss of the advantages of superior education, social position, and personal comforts constitutes an injury capable of being estimated in money.

He also says, p. 768: "We are not insensible to the argument *ab inconvenienti*, founded on the very serious consequences which might ensue to a railway company in the event of a fatal accident happening, from negligence, to an individual of very large fortune. But we think this is rather for the consideration of the legislature, as to whether any limit should be put to the liability, than for us." In the same case in the Exchequer Chamber, 4 B. & S.

p. 506, Erle, C. J., says: "On the second point, also, Mr. Hawkins failed in his argument. He contended that the whole estate of the deceased passed, at his death, to the class of relatives whom the statute meant to protect; and as they got the whole estate among them, no loss was caused to them by his death. The remedy, however, given by the statute is not given to a class, but to individuals; for, by sec. 2, 'the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.' This requires the jury to consider how each of the parties is situated, and how the interest of each is affected. If this is so, the younger children have lost by the death of their father."

This opinion is expressed, because the fund was resettled so as to give the younger children the right to share in only a portion of the income. It will be observed that they were, before the father's death, dependent upon his bounty; that the fund, to a great extent, after his death remained with the mother and eldest brother, and that it did not appear that it would not be still shared in common, or that, as a matter of fact, the children would have any the less the advantages; and yet the court, upon counsel for the children accepting £1000 for each of the children instead of £1500, refused even to give a new trial.

Reference to Sedgwick on Damages, 7th ed. (1880), p. 544, 2d vol., will show that in some of the States the damages are limited to \$5000: this limit seems to apply only in case of death.

The case of *Hetherington v. The Northeastern R. W. Co.*, 9 Q. B. D. 160 (1882), is very like *Franklin v. Southeastern R. W. Co.*, 3 H. & N. 211 (1858), and shows that in the nearly quarter of a century which had elapsed since that decision the principles it laid down had not been shaken.

In this later case the evidence was as follows: "The deceased was my son; he was twenty-nine years old; he gave me a portion of his earnings when I wanted it; I am nearly blind, and injured in my leg and hands; my son used to contribute to my support; I work when I can; I am not so able to work as I used to be; I am fifty-nine; my son was not married. Cross-examined.—Five or six years ago I was out of work for six months, and my son was very kind to me and helped me. Re-examined.—He was always kind to me; I have never had money from him since."

Upon this evidence the County Court Judge ruled that there was not sufficient evidence of pecuniary injury, and nonsuited the plaintiff. A rule *nisi* had been obtained for a new trial on the ground of misdirection. In showing cause, counsel for defendant said: "It was admitted by the father that the son was not contributing to his support at the time of his death, and had not, in fact, assisted him for five or six years. The mere relation of parent

and child cannot give rise to the presumption that the child will give pecuniary assistance to the parent, and from the fact that five years before the son assisted his father pecuniarily no reasonable inference arises with regard to the probability of his doing so again."

The rule was made absolute without calling upon the plaintiff's counsel to support it.

Certain observations of Pigott, C. B., in *London v. Great Southern and Western R. W. Co.*, 16 C. L. 415, may be of assistance in ascertaining the province and powers of a jury in such cases. "As to the probable performance of those duties the jury were entitled to apply their own experience and knowledge of life, and to consider the habits of the peasantry of the country, and the probable amount of assistance and support which a widow might fairly and reasonably expect from a son."

Endeavoring to apply the principles to be gathered from the above cases:

First, as to the claim of the husband—The claim stands upon as high ground as by a father for the death of a son. We have seen that assistance in the performance of labor, the remuneration for which goes to the father, is pecuniary assistance.

HUSBAND MAY  
RECOVER FOR  
KILLING OF WIFE.

Does not a frugal, careful, loving wife, by attending to the household duties, disbursing the earnings of the husband with care and discretion, watching the servants to see that waste is not committed, repairing the clothes of husband and children so as to make them more lasting, and by a thousand and one other ways which will suggest themselves to the mind, render pecuniary assistance to the husband as certainly as if she went out from home and earned money and brought it into the common fund?

Applying our common every-day knowledge of life, we know that a husband with a frugal, careful wife will have a neat, comfortable home, a well-spread table, cleanly, well-dressed children; while another, with the same amount of income, who has lost his wife and has to trust his home and family to hirelings, will have a comfortless, untidy home, an ill-prepared table, and slovenly children, and run into debt. Is there room for doubt on such a question? Would not the removal of such a wife be a loss to a man of "personal comforts," and constitute an injury which a jury can estimate in money? The son performs labor which brings in money, and by the money the father secures personal comforts. The wife labors and manages the moneys brought in by the husband so as to provide for his personal comforts. Is there any real distinction?

We are told you cannot measure affection in money, and the wife can be only looked upon as a person performing certain duties which may be performed by others, and perhaps better performed.

While affection, and its loss as such, cannot be measured, it is clear that affection is, in most cases arising under the statute, the ground upon which is based the reasonable expectation of assistance. What hope would a father have of assistance from an unkind son who had proven that he had banished all filial love? Apart from the question of wages to be paid to a housekeeper, it seems so me that it is affection which makes the services of a wife of greater financial value to a husband than the services of a housekeeper.

In the judgment of Bramwell, B., in *Osborne v. Gillett*, L. R. 8 Ex. 88, it is said that "it is obvious that the case of master and servant raises a different question from that of wife and husband." This language is referred to by the learned Chief Justice of Ontario, presiding in the court below. I think we may draw a different meaning from it to what he does.

Between master and servant the only tie is that of service rendered for hire or reward. While, of course, a good servant may have an affection for his or her master, and render willing service, a good master, on the other hand, would take care to exact no service for which he gives no remuneration. On the other hand, while services are rendered by a wife to her husband and to her children, the inducement is love and affection. What limit is there to such service? The limit is measured by the love and affection, and such a wife and such a mother, nerved by love, renders service which money cannot buy, and the deprivation of which results in loss of personal comfort.

It seems to me, therefore, it may well be, that for the death of a servant the master may not have an action, as such service may be obtained for a similar wage, and yet a husband may have an action for injury sustained in the removal of a wife whose death may cause great loss and injury. While *Osborne v. Gillett*, L. R. 8 Ex. 88, decides that a master cannot recover for the loss of a servant by death, it seems clear that it does not affect the consideration of this case.

The declaration was for loss of service and burial expenses. It was by the father as master, not as administrator, nor under Lord Campbell's Act, nor was the line of cases which have been cited to us referred to in any way. I am glad it does not control us in considering this case—as I may perhaps venture to say that the reasoning in Baron Bramwell's dissentient judgment is convincing to my own mind.

The father of a family, discharging the duties of his position, must either have some one to take care of his children or take care of them himself. If he stays at home and takes care of them himself, he cannot go out and earn money for their maintenance. If, therefore, his wife stays at home and discharges the household duties and enables him to go out and earn money, does she not afford him pecuniary assistance as surely as the son who carried up

the coals for which the father received remuneration? I think I may adopt the language of Bramwell, B., in *Osborne v. Gillett* (p. 99): "In this case it seems to me that the principle the plaintiff relies on is broad, plain, and clear, viz.,—that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should show a clear and binding authority either by express decision or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in the English law. I find neither."

The claim of a husband for loss of a wife is not a singular one in England.

In the cases referred to in the judgment below, of *Cotton v. Wood*, 8 C. B., N. S. 568; *Condcliff v. Condcliff*, 22 W. R. 325; *Evans v. Brend*, *Law Times*, July 8, 1882, the courts had an opportunity of stating that such an action could not be entertained, and yet we do not find any such question raised.

The want of authority is authority for the proposition, for it seems to me, with great deference, that to hold in favor of the plaintiff will not be to add a clause to the act, but that a contrary decision would be to declare that this case is one which is to be excluded from the provisions of an act which is wide enough in terms to cover the case. It will be remembered that the decisions have not been to determine what cases are to be held as coming within the act, but rather what cases are to be held as not coming within the act. Therefore, if actions were brought, as it appears they have been, to recover for the injury occasioned by the death of a wife, and the decision was in favor of her administrator, it probably would not excite attention or be reported. On the other hand, if the decision had been adverse, it would be another case determined not to be within the act.

I think I am drawing the correct inference, because I find that in *Condcliff v. Condcliff*, which was an action by the son against the father for his portion of £5000, recovered by the father as administrator of his wife—under Lord Campbell's Act—for the benefit of himself and his children, it appears that the defendants in the original action, i.e., the *Southeastern Ry. Co.*, allowed judgment to go by default of a plea, and the damages were ordered to be assessed, but before the inquiry was made negotiations resulted in a consent order for £5000.

It will be noted that the defendant company was the same company that was defendant in the early suit of *Franklin v. Southeastern R. W. Co.*, and *Dalton v. Southeastern R. W. Co.*

Reference to the report of *Evans v. Brend* shows that the facts were these: "The plaintiff's wife, a woman between fifty and sixty years of age, was crossing Endell Street at eleven o'clock, on the 25th of March, 1882, when she was knocked down by a hansom-

cab, and received injuries from which she died very shortly afterwards."

I would conclude from the report that the parties were in very humble circumstances, as the husband was not represented by a solicitor at the inquest, and a certain person from the office of a legal firm "tapped him on the shoulder and said, 'I am watching the case for you.'"

This appears to have been the mode of obtaining the retainer, and we are not, therefore, surprised to find the note of the case under the head "Speculative Actions."

It would seem as if such a case afforded the facts necessary to raise the questions raised here; but if so, they were not thought of enough importance to merit reporting.

So also *Cotton v. Wood*, where the case went off on another point, and no discussion arose on the questions presented to us for decision.

In the nature of things, actions by the husband for the injuries sustained by the death of a wife would be much less frequent than by a wife for the death of a husband.

The observations of Pollock, C. B., in *Gillard v. Lancashire & Yorkshire R. W. Co.*, 12 L. T. 356, need not be questioned. His words, interweaving question and answer, are: "Clearly a widower would not be entitled to sue for the loss of the society and comfort of his wife, unless her death is the cause of a pecuniary loss by the husband." This is not very accurate language, and in all probability would not have appeared but for the somewhat loose manner which resulted from hurried answers given to somewhat hastily put questions by counsel during the argument. The exact question was: "In that view, a widower would not be entitled to sue for the loss of the society and comfort of his wife?" The answer: "Certainly not, unless her death is the cause of a pecuniary loss by the husband."

Is not the fair meaning "Certainly not, but he may if her death is, etc."? This is consistent with all the cases, and leaves to be determined in each case whether there is or is not any pecuniary loss.

It would be clear that if a pension were lost by the death of a wife there would be pecuniary loss. It is equally clear that the poorest peasant "who may lose nothing at all by the death of his wife cannot sue at all."

What the learned Chief Baron was desirous of excluding was damages for wounded feelings. He says: "I think it is utterly impossible for a jury to estimate any sum as a compensation for the injured feelings of the survivors." He also says: "I have frequently expressed this opinion," referring to similar language. It will be remembered that he presided in *Franklin v. Southeastern R. W. Co.*, and *Duckworth v. Johnston*, and from these his fully considered opinion may be gathered.

I am therefore of the opinion that whenever a wife is killed, and such facts as to her life and conduct and relation to her husband and his affairs are laid before a jury as enable a jury to bring to bear their common knowledge of the affairs of life, and to come to the conclusion either that his income is lessened or expenditure increased so as in effect to lessen his income, or that it is less likely that it will be frugally expended in such a way as to surround him with home enjoyments, so that by her removal his personal comfort will be interfered with,—in such a case the husband has given evidence of having sustained an injury within the meaning of the statute, and the jury must be left to give such damages as they think proportioned to the injury sustained.

The principles I have endeavored to ascertain from the decisions seem to me equally applicable to the claims of the children.

Bearing in mind that while affection is not to be estimated in money, and that without affection or good-will it is difficult to find ground for the claim to rest upon, it is clear that if a careful, loving mother is taken away from a family of children they must suffer an injury. We have seen that the jury may look at loss of personal comfort. Who will look so carefully after the children's personal comfort as an affectionate mother? The money which she might expend upon herself is oftentimes placed aside to purchase needed comforts for her child. Who in the hour of sickness will watch with such self-sacrificing care, oftentimes giving her life to save her child's life?

We have seen that the loss of the advantage of superior education may be considered; and I suppose, also, the loss of the advantage of education, primary as well as superior.

Is it likely that any one will so well look after the training of a child as a thoughtful, affectionate mother; see that the school is regularly attended, and the home lessons carefully prepared?

The loss of social position may also be regarded. If a child is well looked after at home, its person kept neat, its habits watched, and its manners well formed, will not its social position be advanced? If the father's income is so disbursed by the mother as to enable her to procure for the children greater comforts than if it were wasted, do they not derive personal benefit?

I quite agree that, to quote the words of the learned Chief Justice in the court below, "the differences between a good and loving mother and a careless, indifferent mother would have to be considered;" but is that different from considering whether a son is good and loving or careless and indifferent? There may be many a case where the children's temporal, and it may be eternal, interests would be advanced, so far as man can judge, by the death of a mother; but so there might be by the death of a father." These are facts to be considered by the jury, and hence is most

pertinent the language of Pigott, C. B., above quoted, that the jury were entitled to apply their own experience and knowledge of life, and to consider the habits of the class from which the parties were drawn.

The children might not at the time of death be in need of any assistance, and yet, according to the rules laid down, the jury are entitled to consider whether if the need should arise they would have a reasonable expectation of assistance.

With great deference, I think the observation of the learned Chief Justice that the jury would have to consider "whether the care and training of the deceased parent could not be obtained from some other source, much to the advantage of the children," should be somewhat guarded.

In the event of it being shown that the deceased parent—say mother—was careful, and so performed household duties as to minister most carefully to the personal interests of her children, and that since her death they had not been so comfortable for want of some one to guard these interests, could the jury be told that they must speculate on the chances of a kind and attentive housekeeper or an affectionate stepmother being provided, any more than if the deceased mother had been an annuitant; that they must consider the chances of the father marrying a second wife with a large annuity; or, in case of an accident by which a man was physically disabled from plying his trade, could a jury be told that he might now be forced into another business much more remunerative, and hence, in all probability, he would suffer no injury, but the accident would prove a blessing in disguise?

Of course a jury would look at all the surrounding circumstances, and if they felt there was no loss they would say so; but if there was, then it would be no less a present loss, because among the chances of the future it might prove a gain.

If one can recover damages for physical injuries which incapacitate him in some degree from physical labor, cannot damages be recovered for injury to the mental being which renders the mind less active? If, as is suggested in the Tilley case, cited in the court below, a person under obligation to furnish a minor with instruction is liable to damages for neglect of duty,—and surely he would be,—is not the person who removes one who can best tutor the mind and train the body liable in damages? Are there not times in the life of a girl when a mother's watchful care and training are all-important to not only her mental and moral nature, but also to her physical being? Is one who negligently deprives her of such a guardian not to answer for it in damages?

I refer also to the American decisions cited in the judgment of his Lordship the Chief Justice and Mr. Justice Armour.

I think the facts in this case rendered it necessary to submit the case to the jury, and that the learned Judge at the trial could not



have nonsuited. I think he could not have withdrawn the consideration of the changed position of the children with reference to the mother's property. If the evidence had justified it, the jury might have found that the father would not have so bountifully provided for the children as the mother. I think the verdict in favor of the father and children justified by the evidence. I have been in some doubt as to the damages; but by what rule can I be guided to enable me to say that they are excessive, and so excessive as to demand a new trial?

The jury are to determine the question, not I. They are to hear such facts as may be given in evidence, and to apply their own experience and knowledge of life, and to consider the habits of the family. How can I tell what information they derived from such knowledge and experience? They may have brought to bear knowledge I never had, and experience I could not obtain. How, then, can I interfere? If I did, what am I to suggest to be told to them at the next trial? If the case were sent down, and it happened that the jury incidentally learned the amount now awarded, and that this court thought such amount excessive, and should ask for guidance to enable them to bring the amount within what would be thought just by the court, what direction could be given? In my opinion, the verdict must stand.

It does not, therefore, become necessary to consider the question stoutly argued by Mr. Osler, that the court below, on a motion for a new trial, had no power to enter a nonsuit. The other questions were disposed of in the court below in the plaintiff's favor, and I think the decision as to them cannot successfully be attacked.

I am of the opinion that the appeal should be allowed, with costs, and the motion in the court below be dismissed, with costs.

**Measure of Damages in Statutory Actions to Recover for Unjustifiable Homicide.**—This subject is fully discussed and the authorities upon it fully collected in the note to *Lehigh Iron Co. v. Rupp*, 7 Am. & Eng. R. R. Cas. 82.

**Notes of Recent Cases.**—The following cases have been decided since that note was made: *Burlington, C. R. & N. R. R. Co. v. Coates*, Admx., 15 Am. & Eng. R. R. Cas. 165, where it was held that life-tables were admissible in evidence to show the probable duration of the life of a person of decedent's age.

In *Little Rock & Fort Smith R. R. Co. v. Barker*, 39 Ark. 491; s. c., 19 Am. & Eng. R. R. Cas. 195, it was held that where the decedent was a child too young to be of value pecuniarily to its parents they were entitled to recover what the child's services probably would have been worth during minority, less the expense of its support during that period; and that the jury could assess such damages without any evidence having been offered as to what the value of the service of the particular child would have been likely to be (on this last point there was a dissenting opinion). The same principle was laid down in *Holton v. Daly*, Admx., 106 Ill. 181, 188. But see *Houston & T. C. Ry. Co. v. Cowser*, 57 Tex. 298.

In *St. Louis, I. M. & S. R. R. Co. v. Freeman*, 36 Ark. 41; s. c., 4 Am. & Eng. R. R. Cas. 608, it was held that a father could not recover damages for the peculiar value that decedent child's services would have been to him on

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account of the peculiar confidence he would have had in the child by reason of its relationship to him.

In *Atchison, T. & S. F. R. R. Co. v. Brown, Admr.*, 16 Hun, 443, it was held that the measure of damages was the loss of the survivors, not the loss of the decedent; that that involves not merely the probable accumulations of the deceased, but the probability of the benefit of such accumulations inuring to the survivors. That, hence, the fact that the next of kin (decedent's mother) was comfortably off must be taken into account in assessing damages.

The contrary view is held in *Owen v. City of Chicago*, 10 Brad. 465; Ill. Central R. R. Co. v. *Bache, Admx.*, 55 Ill. 379.

In *Houghkirk v. President, etc., of the Delaware & Hudson Canal Co.*, 93 N. Y. 319, it was held that it was the duty of the Supreme Court to revise verdicts and to award new trials when they are excessive, and that it is not excused from this duty by the vagueness and uncertainty of the elements entering into the measure of damages in actions brought under the statute to recover for unjustifiable homicide.

In *Collins v. Davidson, Admr.*, 19 Fed. Repr. 88, it was held that pecuniary advantages which would probably have accrued had not decedent been killed may be allowed in damages.

In *Board of Commissioners of Howard County v. Legg, Admr.*, 98 Ind. 523, it was held that a wife could recover no damages for the loss of the companionship of her husband—that not being a pecuniary loss.

In *Quinn, Admr., v. Power*, 29 Hun. 183, it was held that although it is competent to show the character of the deceased for industry and active kindness towards his relatives, it was improper to admit evidence of particular acts or facts showing such character. (See *Atchison, T. & S. F. R. R. Co. v. Brown, Admr., supra.*)

In *Beems, Admr., v. Chicago, Rock Island & Pacific R. R. Co.*, 58 Iowa, 150, 157, it was held that evidence of the number of the family of the deceased and the amount of his accumulations was incompetent. Beck and Rotherock, J.J., dissented, on the ground that such evidence would tend to show that deceased was industrious and saving, and hence would bear on the question of the value of his personal services to his own estate.

In *Hetherington v. Northeastern Ry. Co.*, 9 Q. B. D. 160, it was held that, in an action brought for the benefit of a father for the killing of his son, the evidence that the father was fifty-nine years old and nearly blind, and was becoming incapacitated for work, and that five or six years before the son had contributed to his support, he being then out of employment, but had not done so since, was sufficient evidence of pecuniary damage to support a verdict for plaintiff.

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## BALTIMORE AND OHIO R. R. Co.

v.

STATE OF MARYLAND, TO USE OF MAHONE.

(*Advance Case, Maryland.* 1885.)

A woman having purchased a ticket upon a railroad was sitting at a station with two platforms, one on either side of the track. She was told by the station-agent to cross the track, as the train she was to take was approaching. She did so, and was killed in the act by the approaching train.

*Held*, that if at the time the station-agent told her to cross, she had time to do so in safety, and unnecessarily delayed, the company was not liable; but that if she had not sufficient time, the company was liable.

The deceased lived with her married daughter and attended to the house-work and to the children, thus enabling the daughter to be constantly out at work. *Held*, that the daughter was entitled to recover damages for her mother's death.

Two married sons of the deceased showed that she was in the habit of assisting in nursing sick members of their families. They failed to show how long she remained, or what was the value of her services; nor did they show that, either before or after their mother's death, they had ever been compelled to employ any one else as nurse. *Held*, that they were not entitled to recover damages for their mother's death.

In order to entitle a party in Maryland to recover damages for causing the death of another, there must be proof of a reasonable expectation of pecuniary benefit or advantage from a continuance of the life of the person killed. No damages will be allowed as a *solatium* for grief or mental suffering.

APPEAL from the Court of Common Pleas.

*Jno. K. Cowen, W. Irvine Cross, and Jos. A. Buchanan* for plaintiff in error.

*John T. Ensor and W. S. Bryan, Jr.*, for defendant in error.

ROBINSON, J.—The court was right in this case, we think, in leaving the question of negligence on the part of the appellant to the finding of the jury. The deceased, a colored woman, about forty-seven years of age, had purchased a ticket from Mt. Winans to Baltimore City. Mt. Winans is a third-class station, at which the way-trains stop on signal by the conductor or the ticket agent. At this station there are two platforms—one on the north side of the track, where the ticket-office is situated, for passengers going towards Washington; and the other on the south side, for passengers going to Baltimore. The deceased was sitting on a bench outside of the ticket-office waiting for the way-train, then overdone, and while sitting there the whistle of an approaching train was heard. The ticket agent turned to her and said, "Come, old lady, your train is coming; come across;" and while in the act of crossing the track she was run over and killed by the engine and cars of the appellant.

It is insisted there was no evidence from which the jury could reasonably find negligence on the part of the appellant, and the court below ought not, therefore, to have submitted the question to the jury. If the case rested solely on the evidence offered by the appellant there might be some ground for this contention.

This evidence shows the distance between the two platforms is twenty-two feet; that when Story, the ticket-agent, directed the deceased to cross the track to the opposite platform, the train had just turned the curve in the road, a point at least a half mile from the station; that after get-

EVIDENCE AS TO  
NEGLECTANCE TO  
BE LEFT TO  
JURY.

ting almost across she threw up her hands and exclaimed, "My bundle! my bundle!" that Story told her to "come across," he would get the bundle; instead of doing so, however, she turned and went back to the office to look after the bundle; that going back she met the witness, Williams, between the tracks, who told her she "had not time to go back and get the bundle and get over before the train comes." In spite of this additional warning, she went back to the office, and afterwards attempted to cross the track in front of the approaching train and was killed. All the witnesses on the part of the appellant, and the witness Ware, on the part of the appellees, say she had time, ample time, to have crossed the track when Story first notified her.

There is evidence, however, on the part of the appellees, from which it may be inferred that the deceased hardly had time to do so safely; that Story himself did not start across until the train had passed the whistling-post, which is only about one-quarter of a mile from the station; that when he got across she was only three or four feet behind him. In directing her to cross the track for the purpose of taking the train, it was his duty to see that she had time to do so in safety; and if there was negligence on his part in this respect, in consequence of which the deceased was killed, the railroad company is responsible. And, as there is a conflict in the testimony upon this point, the court was right in leaving the question to the jury.

Nor do we see any objection to the appellees' second prayer as modified by the court. In actions of this kind the plaintiff must, it is true, prove not only the injury but also the negligence of the defendant. But there may be cases in which the proof of the injury, under certain circumstances, necessarily raises a presumption of negligence on the part of the defendant. The cases of *Christie v. Griggs*, 2 Camp. 72; *Stokes v. Saltenstall*, 13 Pit. 181; *Stockton v. Frey*, 4 Gill, 406; *Carpen v. London R. R. Co.*, 5 Q. B. 749; *Skinner v. London R. R. Co.*, 5 Exch. 786, are familiar illustrations of the application of this principle. These cases proceed on the ground that the carrier is bound to exercise the greatest care and diligence in everything that concerns the safety of passengers; and if one is injured by the breaking down or upsetting of the vehicle used in the transportation, or by the colliding of one train with another, or by the train running off the track from some defect in the road-bed,—in these and other like cases the evidentiary facts in themselves create a presumption of negligence on the part of the carrier. Under such circumstances the carrier must show that the accident happened in spite of the exercise by him and his servants of the greatest degree of care and diligence practicable under the circumstances. In other words, although the burden of proof is on the plaintiff to show that the injury was occasioned by the negligence of the de-

PRESUMPTION OF  
NEGLECT—  
BURDEN OF  
PROOF.

fendant, yet he discharges this burden and makes out a *prima facie* case by showing that the accident happened through the failure of some of the means used by the carrier in making the transit.

It was not necessary in this case to create the relation of carrier and passenger that the deceased should actually have entered the train. If she had purchased a ticket, and was crossing the track by and under the direction of the ticket-agent for the purpose of taking the train, she is to be considered as a passenger, and as such entitled to the rights and protection of a passenger; and it was the duty of the agent, so far as human care and prudence could, to guard against exposing her to danger. And if in the act of crossing the track under such circumstances she was, without any fault on her part, run over and killed by the engine and cars, it is but reasonable to presume that her death was occasioned by the negligence of the agent of the company. And so the court instructed the jury. The court did not say that the mere proof of the fact that she was killed while crossing the track was in itself sufficient to raise a presumption of negligence against the appellant; but in addition to this fact the jury were required to find that she had purchased a ticket and was crossing the track under the direction of the agent of the company for the purpose of taking the train, and while in the act of crossing she was, without any negligence on her part, run over and killed by the train of the appellant. The finding of these facts was, in our opinion, sufficient to make out a *prima facie* case of negligence against the railroad company.

RELATION OF  
PASSENGER AND  
CARRIER—HOW  
CREATED.

We come now to the question of damages as presented by the appellant's sixth prayer. This suit is brought under sections 1 and 2, article 55, of the Code, which provides that in such actions the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit "such action shall be brought."

DAMAGES.

The plaintiffs are a married daughter and two sons, all of whom are over twenty-one years of age. In Hauer's case, 60 Md. 449, it was held not to be necessary to prove that the persons described in the statute had a claim upon the deceased for support or services, which amounted to a legal right, but that proof of a reasonable expectation of pecuniary benefit or advantage from a continuance of the life of the person killed was sufficient to support the action.

RIGHT OF SUP-  
PORT NOT A  
NECESSARY ELE-  
MENT OF DAM-  
AGE—PECUNIARY  
BENEFIT ENOUGH

Now, in this case the proof shows that the deceased's permanent home was with her daughter Martha, one of the plaintiffs; that she attended to the housework and looked after the children while the daughter was away at work; that these services enabled the daughter to work out constantly; and when so at work she earned six dollars a week, and that since her mother's death she

had not been able to go out and work because she had no one to take care of the house and children.

It may not be an easy matter to lay down a fixed and definite rule by which compensation is to be measured in actions of this kind. The statute provides the jury may give such damages as they may think

GRIEF NOT AN ELEMENT. proportioned to the injury; but it does not prescribe in terms on what principle the damages are to be assessed.

It may, however, be considered as settled law that damages are not to be given as a *solatium* for grief or mental suffering on the part of the relatives of the deceased. This was decided in the leading case of *Blake v. The Midland Ry. Co.*, 18 Q. B. 93, upon the construction of the statute 9 and 10 Vic. ch. 93, known as Lord Campbell's Act, from which the provisions in our Code are almost a literal transcript.

It is also well settled that the claim for damages must be founded on pecuniary loss, actual or expected, suffered by the persons described in the statute. *Franklin v. Southeastern R. R. Co.*, 3 Hurl. & Nor. 211. The right to maintain the action is therefore based on the pecuniary interest of the plaintiffs in the loss of the person killed, and the value of such interest is the measure by which damages are to be allowed. If so, then the services rendered by the mother in this case are the pecuniary benefit which the daughter had a right to expect from a continuance of her mother's life. And the value of such services under the circumstances was the measure by which damages were to be assessed by the jury. Not what the daughter might earn by going out to work, as contended by the appellees, because by getting some one to perform the services rendered by the mother, to attend to the house and her children, she may still be able to go out and work.

The sixth prayer by the appellant, which asked the court to instruct the jury that in assessing the damages they must not take into account the money earned by the daughter by her own labor, but must confine themselves to the value of the services rendered by the mother, as if they had been rendered by any other person, ought to have been granted.

EARNINGS OF THIRD PERSON NO ELEMENT OF DAMAGE. As to the two sons, John and James, there is no evidence legally sufficient to warrant the jury in finding they had sustained any pecuniary loss, actual or in expectation, from the death of their mother. The proof is that John is twenty-six years old, is married, and has one child; and James is twenty-eight years old, married, and has two children. The mother, although she made her home with her daughter Martha, was in the habit of assisting in nursing the sick members of her two sons' families. How often she went, how long she remained, and what were the value of such services, nowhere appears. Nor

SONS CANNOT RECOVER DAMAGE FOR DEATH OF MOTHER.

is there any evidence to show that either of them, before or after the death of their mother, was obliged to employ some one to nurse in case of sickness. There is no proof, then, of pecuniary benefit or pecuniary loss. To attempt to assess damages under such circumstances would be to indulge in mere conjecture and speculation—mere guesswork at the best.

In *Dalton v. Southeastern R. R.*, 93 Eng. C. L. 296, and *Franklin v. Southeastern R. R.*, 3 Hurl. & Nor. 211, relied on by the appellees, the proof was altogether of a different character. In *Dalton's* case, the son, who was unmarried, had been in the habit of making a visit to his parents once a fortnight for the last seven or eight years, and taking them on these occasions presents of tea, sugar, and other provisions, amounting in the whole to twenty pounds a year; and it was held that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from the continuance of his son's life as to entitle him to recover damages under the statute. So in *Franklin's* case, the father had been employed to carry up coals to the ward of the hospital, for which he was paid 3s. 6d. a week, but in consequence of ill-health the son had for some time performed the work for his father. As to whether there was any evidence to show that the father had a reasonable expectation of pecuniary benefit from the continuance of his son's life, Pollock, C. B., said "there was. The plaintiff was old and infirm; the son young, earning good wages, and apparently well disposed to assist his father, and, in fact, he had so assisted him to the value of 3s. 6d. a week."

In this case there is no proof that either of the sons had a reasonable expectation of pecuniary benefit from the continuance of the mother's life, and the court ought to have granted the appellant's eighth prayer.

As to the fifth and ninth prayers of the appellant, it is sufficient to say that if Story, the agent, gave the deceased ample notice to have crossed the track in safety, and after getting half-way across she turned and went back to the ticket-office to look after her bundle, and did so against the agent's directions, and then, against the warning of the witness Williams, attempted to cross the track, in consequence of which she was killed, her death under such circumstances resulted from her own negligence, and the plaintiffs were not entitled to recover. As the case will be remanded, an instruction can be prepared in conformity with these views.

We see no objection to the several prayers granted by the court at the instance of the appellee, so far as they apply to the right of action of the daughter Martha. But there was error in refusing to grant the seventh and eighth prayers of the appellant, and the judgment must therefore be reversed.

Judgment reversed and new trial awarded.

## CORLISS

v.

## WORCESTER, NASHUA, AND ROCHESTER R. R. Co.

*(Advance Case, New Hampshire. June, 1885.)*

Section 1 of chap. 35 of Laws of New Hampshire of 1879 provided that in cases of negligent killing, where, if death had not ensued, the person injured would have been entitled to recover damages, his executor or administrator may recover damages for the injury, such damages to be divided in certain proportions among the widow and children or next of kin of deceased. *Held*, that this statute caused the right of action, which at common law died with the decedent, to survive; that the grounds of damage were the physical and mental pain suffered by decedent, expense of nursing, medical aid, loss of time, etc.

CASE for causing the death of the plaintiff's intestate by carelessly running upon him with an engine and train of cars while crossing the defendant's track with a horse and wagon in the highway.

The court ruled that nominal damages only could be recovered, and the plaintiff excepted.

*Henry B. Atherton* for plaintiff.

*C. H. Burns* and *A. F. Stevens* for defendant.

BINGHAM, J.—The court ruled that only nominal damages could be recovered.

At common law the cause of action died with the decedent, but by chapter 35 of the Laws of 1879 it survives to his administratrix, and she may have damages assessed if the liability of the defendant is established. *Clark v. Manchester, Hills*, June term, 1883; *Needham v. Railroad*, 38 Vt. 294, 302.

The ordinary grounds of damages in such cases are the expense of board, nursing, medical aid, compensation for loss of time, physical and mental pain, including such sum as the jury think ought to be given on account of distress or anxiety of mind experienced in view of approaching death, while in imminent danger of the injury received, and to the close of life.

Such damages are not necessarily nominal. What they should be depends upon the varying facts of each particular case, and are for the jury to assess, guided by the instructions of the court as to the law.

Exceptions sustained.

All concurred.



STEWART, ADM'R,

v.

TERRE HAUTE AND INDIANAPOLIS R. R. Co.

*(Advance Case, Indiana. September 16, 1885.)*

In an action against a railroad company by an administrator to recover damages for the unlawful killing of plaintiff's decedent, the complaint must allege the existence of widow, children, or next of kin.

The fact that the trial court overruled a demurrer to a complaint does not preclude it from sustaining a motion in arrest of judgment based on the same objection raised by the demurrer.

APPEAL from Clay Circuit Court.

*Holliday & Byrd* for appellant.

*John G. Williams* and *Knight & Knight* for appellee.

Howk, J.—In this case the appellant, William Stewart, administrator of the estate of William O. Stewart, deceased, sued the appellee, the Terre Haute & Indianapolis R. R. Co., FACTS. in a complaint of three paragraphs. The object of the action, as stated in each of such paragraphs, was to recover damages for the death of appellant's intestate, caused, as alleged, by the wrongful act or omission of the appellee, without fault or negligence on the part of the decedent or of the appellant. The cause was put at issue and tried by a jury, and a verdict was returned to the appellant, the plaintiff below. Thereupon the appellee moved the court to arrest judgment on the verdict, which motion was sustained by the court, and judgment was arrested accordingly.

The sustaining of appellee's motion in arrest of judgment is the only error assigned here by the appellant. This motion was in writing, and stated the following grounds for the arrest of judgment, namely: "(1) Because the complaint herein does not state facts sufficient to constitute a cause of action; (2) because the complaint does not show facts sufficient to entitle the plaintiff, as administrator, to maintain this action; (3) because the complaint does not contain any averments that plaintiff's intestate left surviving him a widow and children, or either of them, or any next of kin; (4) because the complaint does not contain any averments that plaintiff's intestate left surviving him a widow or children or next of kin, nor was it proven on the trial that said intestate left surviving him a widow or children or next of kin."

Appellant's cause of action for the death of his intestate, as stated in his complaint, was unknown to the common law, and

is of statutory origin. *Cincinnati, etc., R. Co. v. Chester*, 57 Ind. 297.

In section 284 Rev. St. 1881 it is provided as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action may be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." This section is substantially a re-enactment of section 784 of the Civil Code of 1852 (2 Rev. St. 1876, p. 309); the only material difference between the two sections being that, under the older one, the damages could not exceed \$5,000. Under the statute the action is prosecuted by and in the name of the personal representative of the decedent, for the benefit, not of the plaintiff, as such, nor of the decedent's estate, but for the exclusive benefit of the widow and children, if any, or the next of kin, of the decedent. If, therefore, the decedent leave neither wife nor child surviving him, and have no next of kin at the time of his death, it is very clear, we think, that his personal representatives could not maintain an action for the recovery of the damages given by the statute against the party whose wrongful act or omission caused his death. In *Indianapolis, etc., R. Co. v. Keely's Adm'r*, 23 Ind. 133, in construing the statutory provisions now under consideration, the court said: "As the right to sue is purely a statutory one, and in derogation of the common law, the statute must be strictly construed, and the case brought clearly within its provisions, to enable the plaintiff to recover. The right to sue is given to the personal representatives of the deceased, and the action is prosecuted in his name; but the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, and therefore the action is, in effect, prosecuted for their benefit. If there were no wife, children, or next of kin surviving the deceased, capable of taking under the statute, the action would not lie. It is therefore clear that the complaint must, at least, aver that there are such persons to whom, under the statute, the damages inure. It is an issuable fact that may be controverted, and must be alleged in the complaint, and, if denied, must be proved, to sustain the action." To the same effect, substantially, are the cases of *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477, and *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48.

In the case at bar, the objections urged by the appellee, in its motion in arrest of judgment, to the sufficiency of appellant's complaint are well taken as to each paragraph thereof. It is nowhere

WIDOW, CHILDREN OR NEXT OF KIN ESSENTIAL TO ACTION FOR KILLING.

averred in the complaint, or in any of its paragraphs, that appellant's intestate left surviving him, at the time of his death, a wife or child, or any next of kin, or any person to whom, under the statute, the damages would inure. Such an averment of fact or facts was and is essential to the appellant's right of recovery in this action, and there is nothing in his complaint, or in any of its paragraphs, from which such fact or facts, by the most liberal intendment, may be inferred. In such case it is well settled by the decisions of this court that, upon a proper motion therefor, the judgment must be arrested. *Heddens v. Younglove*, 46 Ind. 212; *Newman v. Perrill*, 73 Ind. 153; *Eberhart v. Reister*, 96 Ind. 478.

The point is made by appellant's counsel that the motion in arrest ought to have been overruled by the court, because it had previously overruled appellee's demurrer to his complaint. This point is not well taken. In *Newman v. Perrill*, *supra*, the appellant contended that because the circuit court had overruled demurrers to his complaint it could not afterwards rightfully sustain a motion in arrest. In answering this contention this court there said: "We do not think that the court, by ruling wrongly on the demurrers, precluded itself from afterwards ruling rightly upon the motion in arrest. . . . A complaint fatally defective is vulnerable to attack even upon appeal, and there can certainly be no error in declaring such a complaint bad on motion in arrest, although demurrers may have been previously overruled. It is the duty of the court not to permit a judgment to be entered upon a complaint which is so clearly insufficient as to afford the judgment no foundation."

IF NOT SHOWN,  
JUDGMENT MAY  
BE ARRESTED.

Some other objections are urged by the appellant's counsel to the action of the court in arresting judgment on the verdict; but these we need not and do not consider. For reasons already given, the appellant's complaint was radically and fatally defective, and we are bound to assume, in the state of the record before us, that the defects in the complaint were not supplied by the evidence, nor cured by the verdict, if such a thing were possible. If the decisions of this court in Indianapolis, etc., *R. Co. v. Keely's Adm'r*, *supra*, and the cases which follow it, state the law correctly, as we think they do, and if we adhere to those decisions, as we think we must, it is certain that the court did not err, in the case in hand, in sustaining appellant's motion and arresting judgment of the verdict.

The judgment is affirmed, with costs.

RUTTER

v.

MISSOURI PACIFIC R. R. Co.

(81 *Missouri*, 169.)

Section 2121 Rev. Stats. of Missouri of 1879 provides that the damages allowed for wrongfully causing the death of a person "may be sued for and recovered : first, by the husband or the wife of the deceased ; and, second, if there be no husband or wife, or if he or she fail to sue within six months after such death, then by the minor child or children of the deceased." Section 2125 provides that the action shall be brought within a year from the time of death. *Held*, that the word "minor" in section 2121 was not intended to limit the time to bring suit to the period of minority where a child, under age at the time death ensued, attains his majority within a year from that time, and brings suit after becoming of age and within the year.

ERROR to Jackson Special Law and Equity Court.

*Theodore Winningham* for plaintiff in error.

*E. A. Andrews* for defendant in error.

HOUGH, C. J.—On the 30th day of April, 1877, Rachael Ann Rutter was fatally injured by the cars of the defendant, and died from the injuries so received, on the 4th day of May following. At the date of her death she had no husband living, and had only one child, who is the plaintiff in this action. He became of age on the 2d day of August, 1877, and on the 29th day of April, 1878, instituted the present action, under the statute, to recover damages for the death of his mother. The foregoing facts appear in the petition, and a demurrer thereto was sustained, on the ground that the plaintiff should have sued while he was a minor, and that he could not bring the present action after he had attained his majority. Final judgment having been entered for the defendant, on the demurrer, the plaintiff has brought the case to this court.

The statute under which this suit was brought, provides that the damages thereby allowed "may be sued for and recovered : first, by the husband or the wife of the deceased ; and, second, if there, be no husband or wife, or if he or she fail to sue within six months after such death, then by the minor child or children of the deceased." R. S. 1879, § 2121. It is also provided that every action instituted by virtue of this statute "shall be commenced within one year after the cause of such action shall accrue." § 2125. It is contended on behalf of the defendant that two limitations are imposed by the statute on the right of a child to sue: one is, that the suit shall be instituted within one year, and the other is, that such child shall be a minor at the time of the institu-

tion of the suit; and unless both concur, no action can be maintained. This question has never been passed upon by this court; and we know of no case, in any of the States, where statutes similar to ours have been enacted in which this precise question has been determined or discussed. The language of the statute, when epitomized so as to be applicable only to cases like the present, is that the damages allowed may be sued for and recovered by the minor child or children of the deceased.

The defendant contends that as the damages are, by the terms of the statute, to be sued for by the minor, no suit can be brought by a child who has attained his majority.

That this argument is based upon too narrow a construction of the statute will be rendered apparent when we consider that the statute not only provides that the damages may be sued for, but also recovered by the minor; and the rule of interpretation contended for by the defendant would restrict a right of recovery to one who had not attained his majority at the time judgment was rendered in his favor. To make a suit, which had been seasonably brought, abate by reason of the plaintiff having attained his majority before judgment, would, indeed, be sticking in the back. No such case has been found in the reports of this State, and our attention has not been called to any such elsewhere. All the judges are of opinion that the true construction of the statute is, that the suit is to be brought in the name of the child or children who are minors at the time the cause of action accrues to them.

When the right of action once accrues to the child, it is a vested right which is not determined by the attainment of majority, but may be asserted by such child at any time within one year from the death of the parent.

MINORITY OF  
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YEAR FROM  
DEATH.

The judgment will be reversed and the cause remanded.

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McKIMBLE, Adm'r,

v.

BOSTON AND MAINE R. R. Co.

(Advance Case, Massachusetts. June 24, 1885.)

In an action of tort brought by an administratrix against a railroad company for causing the death of plaintiff's decedent through the negligence of defendant and the gross negligence of its servants (Pub. Stat. c. 112, § 212), *held*, that the plaintiff was not under the burden of proving that decedent had been guilty of no contributory negligence, if plaintiff's decedent was a passenger at the time he was killed.

Where the deceased left a car on the wrong side, owing to the negligence of the defendant in not preventing passengers from leaving on that side, or

notifying them not to do so, he must be regarded as a passenger within the meaning of that word in Pub. St. c. 112, § 212, though it did not appear that he was not negligent in so leaving the car.

THIS was an action of tort, brought by the administratrix of the estate of Jeremiah McKimble, to recover damages for his death which was caused by his being run over by a train on the defendant's road. At the trial in the lower court the presiding judge directed a verdict for the defendant.

*Chas. G. Fall* for plaintiff.

*Solomon Lincoln* for defendant.

W. ALLEN, J.—While there was evidence proper to submit to a jury of the negligence of the defendant, and of the gross negligence of its servants or agents, there was no evidence of the exercise of ordinary care by the deceased; and the ruling of the court that the action could not be maintained was correct, if the burden was upon the plaintiff to prove such care. Whether such burden was upon the plaintiff depended upon whether the deceased was a passenger. If he was a passenger, and his life was lost through the negligence of the defendant, or the gross negligence of its servants or agents, it would not be necessary to prove that he was not negligent. Pub. St. c. 112, § 212; Com. v. Boston & L. R. Corp., 134 Mass. 211. If, therefore, there was evidence to be submitted to the jury that the deceased was a passenger when he was injured, the ruling was wrong.

The deceased was upon a regular passenger train from Boston, and the only ground for contending that he was not a passenger upon it was that he left it without surrendering his ticket or paying his fare. He had a ticket which gave him the right to ride as a passenger, and he had no opportunity to surrender it or to pay his fare. It cannot be assumed, as matter of law, that he was not riding upon the ticket which he held, or that he intended to evade

FACTS. the payment of his fare, or left the car for that purpose. There was evidence tending to show that the deceased left the train after it had stopped at a station where passengers were accustomed, and had a right, to take and leave the cars. If a passenger, he would continue to be such while rightfully leaving the train and station. It is objected that he had no right to leave the car in the manner in which he did, and that before he was injured he had ceased to be a passenger by leaving the car negligently, and as he had no right to. But it does not appear that he did not so leave it in consequence of the negligence of the defendant. The defendant had made provision for passengers to leave the cars only upon one side of the track, and it was dangerous to leave upon the other side. Upon the evidence it was a question for the jury whether it was negligent in the defendant not to have provided some means to prevent passengers from leav-

LEAVING CAR—  
NEGLECTANCE.

ing on the wrong side, or to notify them not to do so. If there was such negligence of the defendant, and in consequence of it the deceased, being a passenger upon the car, left it upon the wrong side, and thereby lost his life, we think he must be regarded as a passenger within the meaning of that word in the statute, although it did not appear that he was not negligent in so leaving the car. To this extent we think that the rulings at the trial were wrong. Verdict set aside.

**Interruption or Termination of the Relation of Passenger caused by leaving the Train before it stops at the Station to which the Passenger is bound.**—In the case of *State v. Grand Trunk Ry. Co.*, a passenger, while the train on which he was riding was stopping on a side-track to allow another train to pass, crossed the main track and went behind a water-tank for a certain purpose. While recrossing the track to regain his train he was struck by the passing train and killed. An indictment was brought under the statute to recover damages for the killing, in the trial of which the question of the termination of the relation of passenger by decedent's leaving the train and crossing the track was involved as bearing upon the question of the railroad's negligence. On this point the language of the court was as follows: "When a train stops at one of its stations to discharge and receive passengers belonging to that particular station, the company is bound to see that proper modes of egress and ingress are provided for such passengers. But the other passengers may leave the car, unless notified not to do so, but it must, to a certain extent, be at their own risk, so far as the usual modes of egress or ingress are in question. And the same rule applies more strongly, when a train stops on a side-track, awaiting the passing of another train out of time. In such a case the duty and the safety of the passengers both concur in saying to those who are not destined for that station, that they should remain in the car. That is the place of safety. The uncertainty as to the time when the other train may pass, and as to its rate of speed and the danger in standing on or near the track, or in passing across it, are all suggestive of risk, and of the necessity of great care and caution to avoid injury.

"If, however, no objection being made or notice given, the passenger, who properly ought not, does leave the car when thus stopping, does no illegal act, but he, for the time, surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence. He may return to his seat and resume his place and rights as a passenger on that train before it starts." *State v. Grand Trunk Ry.*, 58 Me. 176.

Public Statutes of Massachusetts, c. 112, §212, relates only to the killing of passengers or employees or servants of the railroad. Hence, in cases where the decedent was not in the employ of the road it is necessary to prove that he was a passenger. In the case of *Commonwealth v. Boston & Maine R. R.*, the train had slowed up at a station and nearly stopped; but the engineer, seeing another train coming in the opposite direction on the track between his train and the station, started up again. Just before the train started up, decedent alighted from the train and was killed by the approaching train while crossing to the station. It was held that decedent ceased to be a passenger by leaving the train while in motion. The court say: "The duty of the corporation towards him (the passenger) is to furnish a well-constructed and safe road, suitable engines and cars, competent and careful engineers, conductors, and other necessary laborers, in order that all injuries which human foresight can guard against may be prevented. But

this duty rests on the corporation only so long as the passenger sees fit to be carried by it; and if he chooses to abandon his journey at any point before reaching the place to which he is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of travelling further. And while it is true that if he leaves the train while it is at rest at a station he is entitled to an opportunity to do so in safety, it is equally true that the corporation is not under any obligation to make it safe for him to leave the train while it is in motion, and that if he does so he assumes all risk of injury." *Commonwealth v. Boston & Maine R. R.*, 129 Mass. 500; s. c. 1 Am. & Eng. R. R. Cas. 457.

On the general question of recovery for injuries to passengers while getting on or alighting from trains, see note to *Cincinnati, Wabash & Michigan R. R. Co. v. Peters*, 6 Am. & Eng. R. R. Cas. 136.

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STATE

v.

MAINE CENTRAL R. R. Co.

(*Advance Case, Maine. April 6, 1885.*)

A statutory indictment against a railroad company for the negligent killing of a person is a proceeding essentially civil in its nature, and hence the prosecution may be permitted by the court to enter a *nolle prosequi* during the trial.

*W. T. Haines*, county attorney, for State.

*Baker, Baker & Cornish* and *G. C. Vose* for defendant.

PETERS, C. J.—Whilst the trial was going on under this indictment, the evidence being partially in, the prosecutor was permitted by the presiding judge to discontinue the indictment by entering a *nolle prosequi*. The discontinuance was entered according to the civil and also according to the criminal form of procedure. If the proceeding is a civil suit, the nonsuit was allowable, but otherwise if a criminal prosecution; for at such stage of the trial the alleged criminal, if he demanded it, would have a right to have a verdict rendered. *State v. Smith*, 68 Me. 328.

We think the proceeding is essentially civil in its nature, in form a criminal prosecution, in fact a suit. It is for reasons a privileged proceeding. It has the rights incident to a civil suit, and something more. It would have a less right than belongs to a civil action if the prosecutor cannot, the court assenting to the act, become nonsuit before the case be committed to the jury. Our opinion is that the prosecutor had such right, and that it could



be done by nonsuit or *nolle prosequi*, although *nolle prosequi* would be the more formal and accurate entry. *State v. Railroad* 58 Me. 176; *State v. Railroad*, 67 Id. 479.

Exceptions overruled.

WALTON, DANFORTH, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

**Indictment for Causing Death.**—In Maine, New Hampshire, and Massachusetts, indictment is used as a method of recovering damages for causing death. The proceeding is criminal in its nature, but the fine imposed on the company is applied for the benefit of relations of the deceased. In Maryland, while in such a case the State is the formal party plaintiff, the proceeding is in its nature civil.

The provisions of the Massachusetts statute rendering a railroad company liable to indictment for negligently injuring any person applies equally where the injury results in death and where it does not. *Commonwealth v. Boston & Maine R. R. Co.*, 8 Am. & Eng. R. R. Cas. 297. Under the law of that State, negligence of the company and gross negligence of the company's servants are the two grounds for indicting a railway company for killing a person, and it is necessary that the particular ground relied upon should be set forth in the indictment, and an averment of one is not supported by proof of the other. See *Commonwealth v. Boston & W. R. R. Co.*, 11 Cush. 512; *Commonwealth v. Fitchburg R. R. Co.*, 10 Allen, 189; *Commonwealth v. Vermont & Mass. R. Co.*, 108 Mass. 7; *Commonwealth v. Bost. & L. R. Co.*, 126 Mass. 61.

In Maine, it is well settled that in an action against a railroad company by indictment, the burden of showing that the person killed did not, by his own carelessness, contribute to produce the accident is upon the party prosecuting. *Maine v. Me. Cent. R. Co.*, 19 Am. & Eng. R. R. Cas. 812.

Where the statute declares that railroads by whose negligence the life of a person is lost shall forfeit not less than five hundred nor more than five thousand dollars, to be recovered by indictment to the use of the heirs of the deceased, it was held that the killing must be instantaneous. *State v. Grand Trunk R. R.*, 61 Me. 114. An indictment will not lie against a railroad corporation for negligently causing the death of a person if the road be in possession and managed by the mortgagees of the corporation. *State v. Consolidated, etc.*, R. R. Co., 67 Me. 479.

In New Hampshire, an indictment to recover the fine imposed by statute, where the life of a person is lost by the carelessness of the railroad, must be against the corporation, and not against the individual stockholders. *State v. Gilmore*, 24 N. H. 461.

**Damages.**—The amount of forfeiture between the minimum and maximum fixed by statute should be assessed by the jury. *Maine v. Me. Cent. R. Co.*, 19 Am. & Eng. R. R. Cas. 812.

For a discussion of the general subject of indictment of railroad companies and a collection of the principal cases, see note, *Commonwealth v. Boston & M. R. Co.*, 8 Am. & Eng. R. R. Cas. 304.

## BURTON

v.

## GALVESTON, H. AND S. A. R. R. Co.

(61 *Texas Reports*, 526.)

Either party to a cause has a right to obtain the commission and take the deposition of a witness to whom interrogatories and cross-interrogatories have been propounded and filed, when notice of the intention to take the deposition has been given.

The fact that the officer who took the deposition of a witness occupied the same room with an attorney for one of the parties, or that he was himself an attorney for one of the parties in other cases, affords no ground for suppressing the deposition.

In a suit against a railway company for damages caused to a passenger from personal injuries inflicted by the alleged negligence of the employees on a railway train, it was shown that both the train and road belonged to the company, though the road had not been formally received from the contractors who constructed it. The engineer, conductor, and employees were, when the accident occurred, employed and paid by the company, and could be discharged on complaint of the contractor. *Held*:

(1) That these facts, unexplained, would make the company liable for the negligence of the engineer and its other employees on the train.

(2) That if the train was run by the company with its own employees, for the purpose of transporting construction material for the contractors, the company would be responsible to any one not an employee for injury received by the negligence of those operating the train, even though the contractors had the right to determine when, where and to what extent supplies should be transported, and to that extent had the control of the company's train and employees.

(3) It would seem that, even if the employees operating the train, who were employed and could be discharged by the company alone, were yet operating the train in transporting supplies according to the directions, and subject to the will, of the contractors, they would still be the servants of the company, which would be responsible in damages for their negligence.

(4) If, for his own protection, the owner reserves over that which he permits to be used by another the essential powers of a master, it is but just that he should be held to sustain that relationship when the rights of others, affected by the negligence of those selected, paid and kept in his employment, are brought in question.

APPEAL from Bexar. Tried below before the Hon. Geo. H. Noonan.

Mrs. Judy Burton, as surviving widow of King Burton, and as administratrix of his estate, filed her petition against the Galveston, Harrisburg & San Antonio Ry. Co., claiming \$15,000 compensatory damages and \$5000 exemplary damages, on the ground

that her husband, through neglect of the company, lost his life while being transported on its train.

Appellee filed its answer, containing a general denial, and pleading further that if Burton came to his death by an accident on defendant's road, or the Mexican & Pacific extension thereof, such accident occurred on that part of the extension which was not under its management and control, but that the part of the road and the train on which Burton was riding at the time of the accident were in the hands of the construction contractors; that it was used and controlled by the contractors; that the train was a construction or supply train, on which no passengers were carried or permitted to be carried under the regulations of the company; that Burton was not upon the train by authority of any of its officers or agents, but that any ticket or pass which Burton may have had was issued or given to him by the construction contractors, and that the company was in no way liable or responsible for the accident or injury to said Burton.

Verdict and judgment for the defendant. The errors complained of appear from the opinion, as do the essential facts.

*Shook & Dittmar* for the appellant.

*Waelder & Upson* for appellee.

STAYTON, J.—The appellant having filed interrogatories to take the deposition of the witness Monroe, the ap-  
 pellee filed cross-interrogatories, after which the appellant took out a commission to take the answers of the witness, but failed for reasons satisfactory to herself to take the deposition. The appellee then took out a commission and took the deposition of the witness on the same direct and cross interrogatories. Motion was made to exclude the deposition upon the ground that the appellee had no right to take out a commission and take the deposition under the existing facts.

We are of the opinion that the objection was not well taken, and that either party had the right to take the deposition of the witness after the direct and cross interrogatories were filed. Any other course might lead to a great wrong. A person desiring to avoid the testimony of a witness whom he knew would testify favorably to his adversary, if the rule was as contended for by the appellant, could file just such interrogatories as would bring out the evidence desired by his adversary, and, upon the same being crossed, take out a commission and put it in his pocket, never intending to take the deposition, which, but for his apparent preparation to take, his adversary would have obtained. We do not wish to be understood as intimating that there is anything in the record in this case tending to show that the appellant was not acting in good faith at the time she filed interrogatories, and at the time she sued out a commission, and we

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 DEPOSITION MAY  
 BE TAKEN AFTER  
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refer to what might be done under such a practice as is contended for by the appellant for the purpose of illustrating the impropriety of such a rule.

We think that either party, after direct and cross interrogatories have been filed in a case, with notice of intention to take the deposition given, has the right to take the deposition; that the same rule should apply in such case as applies to the right of a party to read a deposition taken by his adversary, if taken on cross-interrogatories which he has filed.

Neither the fact that the officer who took the deposition of the witness had an office in the same room as the attorneys for the defendant, nor the fact that the officer who took the deposition was the attorney for the defendant in some other cases, gave any sufficient ground for rejecting the deposition, it not appearing in any way that the officer was interested in the cause or its defence.

The husband of the appellant was in the employ of Monroe, who was a contractor, engaged in building the extension of appellee's railway; the terms of his contract, however, are not made to appear. There is testimony tending to show that the railway company was operating that part of its road on which the derailment took place from which the death of the appellant's husband occurred, although it had not received the road from the contractor, and there is also evidence tending to show in general terms that this part of the railway was under the exclusive control of the contractor, Monroe.

It appears that the conductor and engineer of the derailed train were employed and paid by the railway company, which alone had the power of selection and discharge. It also appears that it was usual for the company to discharge any of its employees when complaint of misconduct or inefficiency was made by the contractor.

There is some evidence tending to show that the conductor of the train on the day it was derailed, although there was no regular passenger train on that part of the road, received fare for the transportation of passengers, which was contrary to the regulations of the company. The husband of the appellant was travelling on a pass, which was as follows:

"OFFICE OF MONROE & Co., Contractors,  
"END OF TRACK, TEXAS, Sept. 7, 1881.

"*Cond't Supply Train* :—Please pass bearer to and from San Antonio.

W. N. MONROE."

The derailed train was the property of the appellee, and its principal business evidently was to transport such material as was needed in the construction of the road from Lacoste station west to Hondo switch, at which place it was received and distributed by

a locomotive and train under control of another conductor and engineer, as the road advanced westward.

The inference from the record is that the railway company, in making terms with the contractor, had agreed by its own trains, operated by employees of its own selection, and in its pay, subject to be discharged alone at the will of such of its own officers as had confided to them that power, to transport from San Antonio west such material and supplies as were necessary to the proper construction of its road and the support of the contractor and his employees; or that the railway company had contracted to furnish trains so manned to the contractor, with which he might, under his own control, transport such material and supplies as might be needed. To whom the material and supplies necessary to the construction of the road belonged does not appear.

RELATION BE-  
TWEEN RAILWAY  
COMPANY, CON-  
TRACTOR, AND  
THEIR EMPLOY-  
EES DISCUSSED.

On the trial the court instructed the jury:

3. "If you believe from the evidence that Judy Burton was the wife of King Burton, and that said King Burton lost his life in manner and place stated in plaintiff's petition, and that Burton's death was caused by the negligence of the employees of defendant as alleged, you will find for the plaintiff," etc.

4. "If, however, you find from the evidence that the defendant had no authority or control over the section of the road where the said Burton was killed, but that said section of the road was under the control of the contractor, and the train upon which the said Burton was killed was a supply and construction train under the said Monroe's exclusive control as a construction contractor, you will in that event find for the defendant."

The charge given at the request of defendant instructs the jury that "if the train was a construction or supply train under the control of the contractor, then the defendant is not liable, although the conductor and engineer running the train were employees of the railroad company."

The plaintiff requested the court to instruct the jury: "It is a general rule of law that a principal or master is civilly responsible for wrongs committed by his agent or servant while acting about his business. The term servant, as used here, is not restricted to persons engaged in menial service; it is applicable to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the party sought to be charged has the right to control the action of the person doing the alleged wrong, and this right to control is the conclusive test by which to determine whether the relation of master and servant exists; the right to control the conduct of another implies the power to discharge him from the service or employment for disobedience, and accordingly the power to discharge is said to be the test by which to determine whether the relation of master and servant exists." This was

refused. The charge thus asked was copied literally from Thompson on Negligence, 892.

It is urged that the charge given by the court was too general; and also misleading; that the charge given at the request of the defendant was erroneous; and that the charge requested by the plaintiff should have been given, in order that the jury might have some rule by which to determine what the true relation between the railway company and those persons operating its train was.

The charge in every case should be such as to enable a jury to know what the law applicable to the facts of the particular case is; and the more clearly that is stated to the jury, the better the charge, if the rule which forbids a court to charge on the weight of evidence be not violated.

If there was negligence resulting in the death of appellant's husband, that negligence was, under the facts in proof, the negligence of the engineer or conductor of the derailed train; and the question of relationship which they bore to the appellee at the time was one of the most important in the case. This was recognized by the court in the third charge given, in which the jury were informed the plaintiff was entitled to recover if the injury resulted from the negligence of the employees of the defendant. There was nothing in the charge, however, which informed the jury what would constitute those engaged in operating the train the employees of the railway company or the employees of the contractor. As to that, the jury were left to draw their own conclusions, unaided by the charge of the court.

There is no doubt, under the evidence, that the engineer and conductor, and others engaged in running the train, were selected, employed and paid by the railway company, and that they could be discharged alone by some of its own officers empowered by it to act in this respect; cause for the discharge of these persons could be made known to the company by the contractor, and upon his representations they would ordinarily act. This would evidence that while the company withheld from the contractor one of the essential rights of a matter, he was made its servant, in so far as to give information of misconduct, upon which, instead of its own knowledge acquired through its own officers, the employee would be discharged. Nor is there any doubt, from the evidence, that the train which was derailed belonged to the railway company, as did the road on which the train was, even though it had not been formally received from the contractor.

Such a state of facts, unexplained by proof of facts which could in legal effect make the engineer and conductor the employees of the contractor, would entitle the plaintiff to recover, if the injury of which she complained was the result of the negligence of either or both of these persons. *Shearman and Redfield*, 71; *Joyce v. Capel*, 8 Carr & Payne, 370; *Morris v. Kohler*, 41 N. Y. 44;

Scott v. L. & St. K. Docks Co., 3 Hurl. & Colt. 596; Byrne v. Boadle, 2 Hurl. & Colt. 722.

To rebut this *prima facie* case rested with the defendant. Was it enough for this purpose to show that for certain purposes the contractor had an exclusive control over that section of the road, or to show that the contractor, for such purposes, had an exclusive control over the construction train? We think not.

How far the train was under the exclusive control of the contractors will best appear by the insertion of the material parts of the testimony of Monroe, a contractor. He said: "The train on which he was killed was a supply train, under the control and management of the contractors who were building and constructing the road. . . . Frank Fanning was the conductor. Don't remember the name of the engineer. They were running the trains for contractors, hauling material and supplies for them and under their directions. . . . I did have the right over that part of the road, the same that any contractor building a railroad has, the right to order and run trains for material and supplies when the trains should run and where, and in fact I had the general management and control over the supply trains on that part of the road under construction. . . . The contractors building the road had charge of the road at the time he was killed. It was used for running supplies and material for the purpose of building the road, for supplying the contractors with supplies and material. I had the ordering and control of it for hauling supplies and material."

Anderson, the paymaster of the railway company, on this point testified: "The supply trains were furnished the contractors, and they were responsible for them; this was the regulation. The trains from San Antonio west were in charge of the contractor at the time of the accident. . . . The train was the property of the company, and the men running it were in the employ of the company, but the train itself was under the control of the contractor at the time of the accident."

If the contract between the railway company and the contractors was that the former, by its own trains, run by its own employees, undertook to transport for the contractors such materials as might be needed in the construction of the road to be built, then the railway company would be responsible to any one not an employee of the company for an injury received through the negligence of those operating the train; for those thus engaged would certainly be the servants of the company, even though the contractors may have been authorized to determine when, where and to what extent material and supplies should be transported, and to that extent to control the trains and employees of the company.

If the contract was that the railway company should furnish

WHEN RAILWAY  
COMPANY LIABLE  
FOR ACTS OF  
CONTRACTORS.

certain trains or a sufficiency of locomotives and cars to be manned by men of the railway's own selection, to be paid by it, and subject to be discharged by it alone, to be used by the contractors in the transportation of such material and supplies as would be needed, but to be operated according to the directions and will of the contractors, then there might be some question whether those engaged in operating the trains were the servants of the railway company; but even in such a case we are of the opinion that, in reason and upon the weight of authority of adjudicated cases, they are and should be considered the servants of the railway company; for in such case it has retained to itself two of the most essential powers of a master—the power to select and the power to discharge (*Quarman v. Burnet*, 6 M. & W. 499; *Michael v. Stanton*, 3 Hun, 462; *Kimball v. Cushman*, 103 Mass., 198; *Dalyell v. Tyrer*, El., B. & El. 899; *Blake v. Ferris*, 1 N. Y. 49; *Taylor v. W. P. R. R. Co.*, 45 Cal. 335; *Dean v. Branthwaite*, 5 Esp. 36; *Weyant v. N. Y. & H. R. R. Co.* 3 Duer, 362; *Pawlet v. R. & W. R. Co.*, 28 Vt. 299; *Thompson on Neg.*, 892-895; *Abbott on Shipping*, 55; *S. & R. on Neg.*, 71-75; *Wharton on Neg.*, 177); a power presumably reserved for its own benefit and protection; for the protection of the thing to be used by the servant.

The running of a locomotive, an intricate, valuable and dangerous engine, is not knowingly confided to unskilled men—their selection is a matter of importance to the owner; nor is the management of a train of cars knowingly confided to an unskilled person; and when a right to select and employ the persons who are to operate them is reserved to the owner, while the thing is to be used by another, this is done for the protection of the owner against loss which might result to the thing used or to the business of the owner from an unskilled or negligent use of the thing.

If, for his own protection, the owner reserves, over that which he permits to be used by another, the essential powers of a master, it is but just that he should be held to sustain that relationship when the rights of others, affected by the negligence of those so selected, paid and kept in his employment, are brought in question.

If a locomotive or train had been injured or destroyed through the negligence of those engaged in operating them, what case would the railway company have against the contractors under either of the states of facts which, from the evidence as it was developed, may be inferred to have existed? The reply of the contractors to an action for damages based on such facts would be: "Locomotives and trains were operated by men of your own selection, paid by you, and over whom you gave to us no power to discharge. You retained over those operating them the powers



and rights which the master has over his servants, and you must bear the burdens which result from their failure of duty to you." Such a defence would be unanswerable.

If, for an injury resulting as did that under consideration, an action should be brought by the injured person, or by his representatives in case of his death, against the contractors, what would be their reply? It would certainly be: "We were not the masters of those persons who operated the trains; they were selected and employed and paid by the railway company, and we had no power to discharge them. We could direct them what to transport, to what place, and when, but how it should be done, in so far as running the train was concerned, we had no power to control; in reference to that matter, the railway company, for the protection of its own property, operated it by its own servants, and as it does not appear that the injury resulted from any negligence of ourselves or our servants, we are not liable." Such an answer would be hard to meet.

The train may have been "a supply and construction train under the said Monroe's exclusive control as a construction contractor," in so far as, for the purposes of the contractors, it was necessary for it to be, and yet the railway company be responsible for the negligence of its own servants; for its liability must depend on the relationship of those persons to it through whose negligence the injury results, and upon this subject the jury should have been clearly instructed. The broad, general charge given, under the facts in evidence, was calculated to mislead, and ought not to have been given.

The charge given at the request of the defendant, under the facts in evidence, was not only misleading, but was erroneous.

How far both a railway company or other corporation or person, and even an independent contractor doing work for such corporation or person, may each become liable to third persons for torts of persons who hold to each of them a relation such as to render it the right and duty of either to control the employee in reference to a part of the work in which he is engaged, need not be considered in this case.

That neither corporations nor persons are liable for injuries resulting from the negligence of independent contractors or their servants, while engaged in doing work for such corporations or persons, is well settled.

RAILWAY NOT LI-  
ABLE FOR ACTS  
OF INDEPENDENT  
CONTRACTORS.

The rule was recognized in *Cunningham v. Railroad Co.*, 51 Tex. 509, which is cited as an authority in support of the charges given in this case. The defence in that case was that the injury resulted while the train was in the exclusive use and control of the contractors engaged in constructing a portion of defendant's road, and operated by the contractor's own servants, agents and employees. The facts of the case are fully stated in the report of the

case, in so far as was necessary to a correct understanding of the points considered in the opinion; a reference, however, to the record of that case shows that the persons engaged in operating the train were in the employment, pay, and control of the contractors; and under such a state of facts the charge which was given by the court below and approved on appeal was unobjectionable.

It exempted the railroad company from liability, "if at the time the accident occurred, it (the train) was in the exclusive control of the contractors, and was run and managed by them, their servants, agents or employees." Such is not the effect of the charges given in the case before us, nor are the facts the same as in the case referred to.

The charge requested by the plaintiff and refused, as a whole, contained matters which it would have been error to give, but some charge embracing the substance of the charge set out in this opinion should have been given to the jury.

The view taken of the matters already considered renders it unnecessary to consider the assignments of error which relate to the action of the court below in overruling the motion for a new trial.

For the errors indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

See *Hughes v. Cincinnati, etc., R. R. Co.*, 15 Am. & Eng. R. R. Cas. 110.

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SINGLETON

v.

SOUTHWESTERN R. R. Co.

(70 *Georgia Reports*, 464.)

One railroad company leased its road, cars, etc., to another company under authority of an act of the legislature providing for a continuance of the company's lessor corporate existence. Suit being brought by a passenger on the road against the lessor for an injury inflicted upon him by the negligence of the lessee's servants, *held* that the defendant was not exempt from liability to perform all duties imposed upon it by its original charter, there being no clause in the statute authorizing the lease creating such exemption.

*Held* therefore that defendant was liable.

Where a motion for new trial was predicated on five grounds, and was granted on one alone, thereby overruling the other four, exception being taken to such grant of a new trial by the respondent in the motion, and no cross-bill of exceptions being filed by the movant, so as to secure from this court a direct decision in regard to the grounds overruled, as provided by the act of 1880, we must deal with the judgment granting the new trial and consider it just as it was passed upon by the judge below.

While the damages given by the jury in this case may be high under the evidence, they are not so excessive as to warrant the inference of partiality, prejudice or corruption on the part of the jury, or to require a reversal of the judgment below.

IN addition to the report contained in the decision, it is only necessary to state that the motion for new trial contained five grounds. The order granting the new trial was as follows: "Upon hearing and considering the foregoing motion, it is ordered by the court, that the verdict be set aside and a new trial granted, on the ground that the jury found contrary to the evidence and charge of the court on special plea, which is the second plea."

*Blandford & Garrard*, for plaintiff in error.

*W. S. Wallace, Peabody & Brannon* for defendant.

CRAWFORD, J.—This was an action on the case brought by the plaintiff in error against the defendant in error, and in FACTS. which it was alleged that he purchased a ticket from said defendant to ride upon its road from Howard to Geneva and return; that by the carelessness of the said defendant and the negligence of its agents in putting him off its train, he was caused to break his leg and suffer other injuries to his great damage, amounting to twenty thousand dollars.

The defendant pleaded the general issue, and at the trial term of the case filed a special plea alleging that, before and at the time of the accident, the road and cars had been leased by the Southwestern R. R. Co. to the Central R. R. & Banking Co. of Georgia, and that the same were at that time being operated by the latter, and not by the former company. Upon the trial of the issues formed, the jury returned a verdict for the plaintiff, assessing his damages at six thousand dollars. The defendant moved for a new trial, which the court granted alone upon the ground that the jury found contrary to the evidence and charge on the special plea. Upon this decision the plaintiff below assigned error, and asks that the same may be reviewed and reversed.

1, 2, 3. The special plea and the evidence thereunder present the question whether a railroad company which has leased its road, cars and engines, and allowed the lessee company to operate the same in the name of the lessor company, is liable to third persons or the public for the carelessness and negligence of the lessee company.

It is now a well settled principle that a corporation, being the creature of the law, has only the powers conferred upon it by its charter, and that all others not necessarily implied therefrom are withheld. Its grants, whether of powers or exemptions, are always to be strictly construed, and its obligations are to be strictly performed, whether they may be due to the State or to individuals. It seems also to be well settled that

CHARTER POWERS OF COMPANY CONTROL IT.

a railroad corporation, and it is with such that we are dealing in this case, cannot, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease. 101 U. S. 71; 17 How. 30; 21 How. 441; 4 Biss. 35; 10 Allen, 448.

It is not questioned that the Southwestern R. R. Co., if it had been operating its road, would have been liable to respond to the plaintiff in error for any damages sustained by him through the negligence of its officers or agents. If, then, it would be so liable when operated by itself, does a lease made to another company discharge it under the law from such liability.

No case involving this precise question has ever been before this court, but in the case of the Macon & Augusta R. R. v. Mayes, 49 Ga. 355, it was held: "Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has intrusted the franchise, is liable for an injury done, as though the company owning the road were itself running the cars."

This liability is put upon the ground, that "if a railroad company to which the legislature has granted this franchise permit others to use it, the company is responsible to the public for the negligence of such persons.

This, then, being a fixed obligation upon a railroad corporation, is there any way by which it may allow others to exercise its franchise, and absolve itself from such obligation? This can undoubtedly be done by the consent and authority of the legislature granted to that end. Pierce, in his works on American R. R. Law, 244, and on Railroads, 283, lays down the rule as follows: "The company cannot divest itself of responsibility for the torts of persons operating its road, by transferring its corporate powers to other parties, or by leasing its road to them, in the absence of special statute authority and exemption. It cannot by its own act absolve itself from its obligations without the consent of the legislature. The lessees may, however, also be responsible for the injury."

In support of this principle he cites 26 Vermont, 721, which says: "The company owning a railroad will be liable for the acts of their lessees who run the road. As to the liability of the defendants for the acts of their lessees, who were running the defendant's road under a long lease, we think there can be no doubt. Unless we can hold the defendants thus liable, they might put their road into the hands of corporations or individuals of no responsibility. It was upon this ground that the English courts denied the legality of one road leasing itself to another or to private persons, and the consequent loss of security to the public without the consent of Parliament. . . The public can only look

to that corporation to whom they have delegated this portion of the public service. Certainly they are not bound to look beyond them, although they doubtless may do so." See also 17 How. 39; 1 Simon (N. S.), 550; 13 L. & E. 506; 17 Wallace, 445; 10 Gray, 103; 22 Ill. 109; 4 Cushing, 400; 5 Wallace, 104.

In *Railroad Company v. Brown*, 17 Wallace, 450 and 451, the opinion of Judge Davis is as follows: "The second assignment of error denies the liability of the corporation for anything done while the road is operated by the lessees and receiver.

"It is the accepted doctrine in this country, that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public, . . . for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver. Apart from this view of the subject, the ticket on which the plaintiff rode was issued in the name of the Washington, Georgetown and Alexandria R. R. Co., as were all the tickets sold at both ends of the route. The holder of such a ticket contracts for carriage with the company, not with the lessees and receiver. Indeed, there is nothing to show that Catherine Brown knew of the difficulties into which the original company had fallen, nor of the part performed by the lessees and receiver in operating the road. She was not required to look beyond the ticket, which conveyed the information that this road was run as railroads generally are, by a chartered company. Besides, the company having permitted the lessees and receiver to conduct the business of the road in this particular, as if there were no change of possession, is not in a position to raise any questions as to its liability for their acts."

But it is said that the Southwestern R. R. Co. had the consent of the legislature to lease its road, and having entered into contract with the Central R. R. and Banking Co., under that consent, it is absolved from its obligations to the public under its original charter. Authorities are cited to sustain this doctrine; indeed, some of those hereinbefore referred to are relied upon. The view which we take of the law and the cases cited is that the original obligation can only be discharged by a legislative enactment consenting to and authorizing the lease, with an exemption granted to the lessor company. To this effect is the rule laid down by Redfield, *supra*, and sustained by the authorities he cites. If this be not so, it is but adding a new grant to the original company, without a law being passed to that effect. That the obligation originally existed is not denied, and an examination of the act authorizing the lease to be made will show no

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CONSENT  
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such exemption; and without it, we are constrained to hold that no such exists.

"The English statute of 8 and 9 Vict. c. 20, section 87," says Redfield, *Law of Railways*, 616, "gives special permission to one company to contract with other companies for the right of passage over their track. But an agreement between railway companies, without the authority of the legislature, transferring the powers of one company to another, is against good policy, and a court of equity will not lend its aid to carry such contract into effect. . . . It seems to be considered by the English courts that one railway leasing its entire use to another company does not come within this section of the general statute, and as the public thereby lose the security of the first company for care and diligence in the discharge of its public duties, the contract, unless made in the pursuance of an act of legislature, is illegal, as against public policy." He further says: "But even where such contracts have been made by permission of the legislature, it has been held, in this country, that the company leasing itself does not thereby escape all responsibility to the public. But that the public generally may still look to the original company as to all its obligations and duties which grow out of its relations to the public, and are created by charter and the general laws of the State, and are independent of contract or privity between the party injured and the railway."

In the case of *The Ohio and Mississippi R. R. Co. v. Sidney Dunbar et al.*, 20 Ill. 627, the court says: "It will be observed that the legislature has been specific in the enumeration of the powers granted; but in them all we nowhere find any, either expressly or impliedly, giving this power to lease their road so as to release them from liability." So we say of the present case; we nowhere find the power given to lease this road so as to release it from liability; and without such a release expressly granted or necessarily implied, it does not exist.

We are not unaware of the fact that Maine and Louisiana have taken a different view from that which we hold to be the correct one; but under the construction which this court holds should be given to the chartered rights and exemptions of corporations, we are of opinion that it requires not only the consent, but a release by the legislature, to absolve them from the obligations which they owe the public. This was not done.

Besides, in this case the lease itself expressly provides for the continuance of the organization of the Southwestern R. R. Co. One of the conditions thereto is, that it is to have its president, board of directors, and its secretary and treasurer. Its corporate powers are exercised and enjoyed under its original charter, and the reservations set out in its lease. It was sued in its corporate name; it appeared and answered in that name; it is recognized under the

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FROM LIABILITY.

laws of the State in its corporate capacity; it pleads and is impleaded by none other; it transacts its business, through its officers and agents, as the Southwestern Railroad; it so dealt with the plaintiff below in the very ticket which it sold him, and, in the language of Judge Davis in the case cited above, he was not required to look beyond the ticket, which conveyed the information that this road was run as railroads generally are, by a chartered company. If, therefore, the Southwestern R. R. Co. does not desire to be held responsible to the public for the acts of its lessees, so far as relates to the public under its charter, a legislative grant to that end should be obtained, and the business of the road conducted in the name and under the responsibility of the lessee company.

But it is said that the case of *Jones v. The Georgia Southern R. R. et al.*, 66 Ga. 558, rules this case in favor of the defendant in error. We do not so understand it. In that case, there were two questions made and decided. One was that the leaving a copy declaration and process with a depot agent was not sufficient service on an individual lessee of a railroad, even though the lease under which he operated the road may have been made by authority of law. The other, that Jones, the plaintiff, being the track hand and servant of the individual lessees, and not of the Georgia Southern R. R., the latter would not be bound to answer in damages for injuries alleged to have been caused by a co-employee, likewise in the service of the said individual lessees; and especially when the said Jones did not show himself free from fault. The case at bar is widely different, in that it arose, not between the lessee company and one of its servants, but between itself, as operated by the lessee company in its name, and the public, in the exercise of one of its most important franchises—the transportation of passengers.

4, 5. It is insisted by the defendant in error that, although the grant of the new trial was put by the judge below upon the ground which we have been considering, and that it was not a legal ground, yet if the new trial was properly granted upon any of the grounds taken, that his judgment thereon should be affirmed. There were five grounds upon which the defendant asked the court to grant a new trial; the judgment put it upon one specified ground, and that alone, thereby overruling it on the other four. That ruling, so made, was excepted to, brought to this court, and error assigned thereon. No cross-bill of exceptions was taken to the overruling of the other grounds, and which was necessary to have been done in order to secure from this court a direct decision upon the questions therein made, as provided by the act of 1880. This not having been done, this court must deal with the judgment granting the new trial, and consider it just as it was passed on by the judge below. Under that sound discretion with which he is invested by law, he held

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that the defendant was not entitled to a new trial, except upon the ground that the jury found contrary to the evidence and charge on the special plea.

Having disposed of that particular ground, we think it necessary only to notice that which alleges the damages were excessive or not.

Upon this, we say that section 3717 of the Code declares: "The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding." And again, in section 3718, it is declared: "In all applications for new trials on other grounds not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same, according to the provisions of the common law and practice of the courts." It has been so long and so uniformly held that, after the exercise of this discretion by the circuit judge, it will not be interfered with, except where it has been abused, that it is scarcely necessary to refer to it. In the 1st Ga. 610, it was held that, "this court will not grant a new trial, unless some principle of law has been clearly violated, or where there is manifestly no evidence to sustain the verdict." It is not contended in this case that there is no evidence to support the verdict, but that it is excessive and unjust. In the language of McDonald, J., in the case of *Bryan v. Acee et al.*, 27 Ga. 91, "we consider the damages given by the jury in this case high, under the evidence, but we do not consider them so excessive as to warrant the inference of partiality, prejudice, or corruption on the part of the jury who rendered the verdict." And in the same safe judicial line, we quote from Benning, J., in the case of *Adkins v. Williams*, 23 Ga. 284. He says: "The court below did not think the damages excessive. And the court trying the case must ever receive more light on the question of excessive damages than it can impart to any other court. The damages may be heavy, but there is not enough disclosed to this court to satisfy it that they are excessive. The boundaries for the amount of damages in cases of this kind are anything but fixed."

So that, upon the facts and the law of this case, we see no legal reason upon which to say that the judge below abused his discretion in overruling the defendant's motion for a new trial on this ground, and we conclude this opinion by adding that which McCay, J., said in the case of *Kelly v. The State*, 49 Ga. 16:

"The real question in this case is whether this tribunal, a court of law, composed of three men not of the vicinage, shall declare the verdict of a jury, chosen by law, and required and authorized by law to pass on the facts, not supported by the evidence. We have again and again declared our opinion that this court has no



power to act as a court of appeal from the verdict of a jury. Indeed, it is only by a sort of fiction that we have jurisdiction at all over a verdict of the jury upon the facts. The constitution expressly declares that this court shall have no original jurisdiction, but shall be a court alone for the trials of errors in law or equity from the superior courts, etc. The constitution gives to the superior court the right to grant new trials in the superior court on proper and legal grounds, and it is only where the judge of the superior court has, in granting or refusing a new trial, committed an error of law that the jurisdiction of the supreme court arises."

Judgment reversed.

**Liability of Lessor for Torts of Lessee.**—For a discussion of the subject of the liability of a lessor road for the torts of its lessee see note to *Freeman v. Minneapolis, etc.*, R. R., 7 Am. & Eng. R. R. Cas. 418.

### SHELBY R. R. Co.

v.

### LOUISVILLE, CINCINNATI AND LEXINGTON R. R. Co.

(*Advance Case, Kentucky. Feb. 19, 1885.*)

A railroad establishes a station at its point of junction with a connecting road and only  $\frac{1}{4}$  mile from a station previously established by the connecting road, *held*, it cannot compel the connecting road to stop its trains at the new station and deliver and receive passengers and freight there. Nor has it the right to run its own trains over the connecting road unless expressly authorized by charter or by contract with the road.

APPEAL from Louisville Chancery Court.

*Caldwell & Harwood* for appellant.

HINES, C. J.—This is an action by appellant, the Shelbyville R. R. Co., against the Louisville, Cincinnati and Lexington R. R. Co., by which it is sought to enjoin the latter company from doing certain things that are claimed to be detrimental to the former. The court below dissolved the temporary injunction which had been granted, and the question is on the correctness of that ruling.

The complaint is first, of the refusal of appellee to permit appellant the use for a half mile, by its engines and cars, of <sup>FACTS.</sup> the roadbed and turn-table of appellee; second, the refusal of appellee to make with appellant through rates and execute through bills of lading for freight and through rates for passengers, and to haul its cars over appellee's road to their destination; third, the refusal of appellee to stop all its trains at the junction of the two road, a half mile from appellee's depot.

These rights are claimed by appellant upon three grounds, first by virtue of the provisions of the charters of the companies, second by usage and customs between connecting lines, and third under contract entered into between the two companies.

Appellee's road, at the time this controversy arose, was operated under a charter granted to the Louisville and Frankfort R. R. Co., in 1847. The provisions of that charter bearing upon the questions to be considered are as follows:

"It shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons or merchandise, or produce of any description whatsoever, along said roads or any of them without the license or permission of the president and directors of said company." (Section 44.)

"That full right and privilege is hereby reserved to the citizens of this State, or any company hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for, any other railroad leading from the main route and diverging therefrom at an angle of twenty degrees or more, to any part or parts of the State: Provided that in forming such connection no injury be done to the works of the company hereby incorporated." (Section 49.)

"It shall be lawful for new companies hereafter to be incorporated to unite with this road, and the said company hereby incorporated shall not charge for freight and passengers brought on from other railroads, as above permitted, any more than the regular rate charged on this road, from end to end *pro rata*." (Section 54.)

In 1851, appellant, the Shelbyville Railroad, was chartered with permission to "intersect" with the Louisville and Frankfort Railroad at such point as might be agreed upon by the president and directors of the Shelbyville R. R. Co. (Section 15, acts 1851, ch. 481.)

The Shelbyville road was constructed, nineteen miles in length, and connected with the Louisville and Frankfort road at a point a half mile from the depot of the latter road at Anchorage, at which place the L. & F. road then had and now have ample depot facilities for freight and passengers, together with switches and turn-tables. The Shelbyville road erected no depot building at the junction with the L. & F. road, had no switches or turn-tables, the only accommodation for the transfer of passengers and freight being an unenclosed platform in the angle of intersection. After this connection the Shelbyville road was permitted without agreement, for a time, to use with its engines and cars the track of the L. & F. road from the junction to Anchorage. Subsequently an agreement was made between the roads for hauling cars of each over the road of the other and for through passenger and freight

rates. This agreement had ceased before the beginning of this controversy, and the track of the L. O. & L. was being used by permission only.

The common-law obligations of a railroad company to a connecting line are the same, as to reception, transportation, and delivery of freight, as those existing between the railroad company and an individual shipper. What-  
COMMON - LAW  
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PANY TO CON-  
NECTING LINE.  
 ever rights or privileges, other than those belonging to a natural person, that are claimed by one railroad company against a connecting company, must be found either in the charters of the companies or arise from contract. The legislature may unquestionably, when not forbidden by the organic law, regulate the business relations between connecting lines of railroads. In this instance we think the legislature has not attempted to regulate the business connections between the lines of the opposing companies. The language of the charters quoted not only fails to provide for more than a physical connection between the roads, but negatives the idea that there shall be any business connection except by consent or agreement. The 44th section of the act of 1847 provides that it shall not be lawful for any person or corporation to use the company's road for the transportation of merchandise or otherwise without the consent of the company.

The claim made by appellant to the use of the track of appellee, with its engines and cars, is, if granted, destructive of  
USE OF TRACK BY  
ANOTHER COM-  
PANY.  
 appellee's franchise. Appellee does a through business, connecting north, south, east and west, has eighteen freight and passenger trains passing the point of junction of the two roads within twenty-four hours, in addition to wild or extra trains, that may be necessary for the transaction of the business of the principal road. From delays by accident or other emergencies it is essential to the preservation of the lives of passengers, the property of shippers and of the company, that all trains moving over the road shall be subject in their movements to the direction of the train dispatcher. Under such circumstances an independent line coming at will, with its engines and cars, upon the road of another company, would necessarily interfere with the business of the line whose road was thus used as to practically destroy it. To allow it would be to allow, without even the pretense of legislative sanction, the one company to take the property of another and appropriate it to its own use. In the absence of legislative or constitutional prohibition, a railroad corporation has the same right, subject to common law restriction, as a natural person, to the use of its property, whether roadbed, franchise, depots, rolling stock or appurtenances necessary or proper to the running of the road under its charter. If the legislature fails to make a contract between connecting lines as to the transaction of the business over and between them, a court of equity cannot make a contract for them

upon the assumption that it would benefit the public or the roads themselves.

The Louisville and Frankfort (now L. C. & L.) had the charter right to fix its depots at such points on the road as it might deem advisable. Prior to the building of the Shelbyville road the L. & F. R. R. Co. had established a depot at Anchorage, erected a depot building, put in switches and furnished all the facilities for passenger and freight traffic, and made that one of its regular stopping places. Subsequently the Shelbyville company, by its president and directors, without agreement or understanding with the L. & F. road, made their junction a half mile from Anchorage. As to the L. & F. Company, there was no charter or common law obligation to stop at any other than the stations established by that company. Appellant had no more right to require appellee to stop its cars at the junction of the two roads than a farmer would have to require its trains to be stopped at the point nearest his house and most convenient to him when there was no established depot at that place. This is a statement of the simple right of it, but the justice of it is stronger still. Appellant had of its own will chosen a point of connection, a half mile from the depot of appellee, which was a regular stopping place with all depot facilities, and appellant did not erect any building at the junction or in any way provide for the transfer of freight and passengers, except by the erection of an open platform. The estimated cost to appellee in stopping its trains at this junction, in addition to stopping at Anchorage, where it was compelled to stop, is twenty-five dollars per day. If appellant should have fixed its junction with appellee's road within fifty feet of the Anchorage depot, as it might have done, it would have had the same right to have required appellee to stop its trains at that junction after having stopped fifty feet beyond at the regular depot. Atchison, Topeka, and Santa Fe R. R. Co. v. Denver & New Orleans R. R. Co., 110 U. S. 607.

It is further insisted for appellant that on the faith of a resolution passed by the board of directors of the Louisville and Frankfort road in 1852, and, before the construction of appellant's road, appellant was induced to raise large sums of money to construct its road, and did construct it on the faith that the L. & F. Company would grant the privileges here claimed. That resolution is as follows: "Resolved, That the president and directors of the Louisville and Frankfort Railroad Company will do all in their power under their charter to facilitate the transportation of freight with as little delay as possible over the Louisville and Frankfort Railroad between Louisville and Shelbyville, whenever the said Shelbyville railroad shall have constructed their road from Shelbyville to a junction with the Louisville and Frankfort road at or near Hobbs; and further.

STOP AT JUNC-  
TION OF CON-  
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CANNOT BE COM-  
PELLED.

NO CONTRACT  
HELD TO EXIST  
AS TO STOPPING  
TRAINS AT RAIL-  
WAY CONNEX-  
ION, ETC., ETC.

said president and directors of the Louisville and Frankfort Railroad Company have no doubt that such arrangements hereafter can be made between the two companies as to enable the people of Shelbyville to arrive in Louisville in the morning and return in the evening, and such other arrangements as will be mutually to the interest of both roads; and the Louisville and Frankfort Company will make a fair contract for the connection of the two roads, should the Shelbyville Company apply for such a connection."

I am unable to see in this any semblance of contract. At most it is simply a proposition, never accepted, never acted upon, so far as the record in this case shows. The proposition was to facilitate the transportation of freight with as little delay as possible. The complaint here is not that there was any delay in the transportation of freight, and as to passengers and freight the resolution expressly reserves that for future agreement. That this resolution was never acted upon by appellant and never considered binding as a contract is manifest from the agreement subsequently entered into, by which the two companies regulated the terms upon which each road should carry the freight and cars of the other, which agreement afterwards expired. The most that could be claimed on the face of the resolution is that freight should not be unnecessarily delayed. That was a common law right existing independent of any agreement, and of which no complaint is made.

Judgment affirmed. Judge Lewis dissenting.

**Constitutionality of a Statute allowing the Use of a Railroad's Tracks by a Connecting Road.**—Where a road, by its charter, is given sole and unrestricted control of its tracks, and it is made unlawful for any other company "to travel upon or use them" without their license or permission, *held*, that a subsequent statute permitting a connecting road to make use of its tracks for five miles on payment of a fair compensation, was an infringement on charter rights and unconstitutional. *Pennsylvania R. R. Co. v. Baltimore, etc., R. R. Co.*, 60 Md. 263.

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#### ATTORNEY-GENERAL

v.

EASTERN R. R. Co.

(187 *Massachusetts Reports*, 45.)

A railroad corporation, which had maintained a passenger station in a town for five consecutive years, after obtaining the approval of the railroad commissioners and of the selectmen, established a new station in the same town and neighborhood, and, after giving public notice of its intention, discontinued the stopping its trains at the old station, and used the new station. *Held*, that there was a relocation, and not an abandonment, of the station, within the Pub. Sts. c. 112, §§ 156, 157.

If the board of railroad commissioners and the selectmen of a town have properly signified their "approval" of the relocation of a passenger station of a railroad corporation, as required by the Pub. Sts. c. 112, § 157, this court will not revise their decision.

The records of the board of railroad commissioners contained a vote that the board approved the relocation of a passenger station of a railroad corporation, "as proposed by the selectmen" of the town. The records of the selectmen contained a vote, written by the town clerk, who was not a member of the board or sworn as its clerk, but who acted as such, that the station "be relocated" at the place named, "in concurrence with the vote of the railroad commissioners." *Held*, that there was an "approval in writing" by the railroad commissioners and by the selectmen, within the Pub. Sts. c. 112, § 157.

INFORMATION, under the Pub. Sts. c. 112, § 156, at the relation of ten legal voters of the town of Everett, to restrain the respondent corporation from continuing an abandonment of its station at Waters Street in West Everett. The answer denied an abandonment, and set up a relocation of the station in pursuance of the Pub. Sts. c. 112, § 157. Hearing before W. Allen, J., who reported the case for the consideration of the full court, in substance as follows:

It was admitted by the respondent that the station in question was established in 1855, and had been continuously maintained until December 18, 1882. On December 16, 1882, the respondent gave public notice that, on December 18, it would discontinue stopping its trains at said station; and, in pursuance of said notice, it did so discontinue to stop its trains.

The relators offered to show, as bearing upon the question whether or not the respondent had in law abandoned said station, that the change of location of the station discommoded more than three quarters of the patrons of said railroad who ordinarily took and left the cars at the station, and compelled them to travel upon each trip fifteen hundred feet farther, to the new station at Prescott Street; that since the establishment of the station at Waters Street, in 1855, a settlement of considerable proportions had grown up about it, attracted to that point by the railroad facilities afforded by the stoppage of trains at said station; that a large number of people had purchased land, and built houses, shops, and manufactories near said station, for the same reason; that, relying upon the continuance of said station, they had paid a much higher price for the land than they otherwise would; that the value of real estate in the vicinity of said station had already been greatly decreased, and would still be further decreased by said abandonment; that the location of the new station was substantially in open land; and that there were very few inhabitants and no business in its immediate vicinity; all of which evidence the judge excluded.

The respondent offered in evidence, which was admitted, against

the objection of the relators, the record of the railroad commissioners approving the relocation of said station, which, after reciting a request of the selectmen of Everett to the board of railroad commissioners for a meeting in Everett for the purpose of relocating a station and the appointment of a day for the meeting, was as follows: "Tuesday, October 11th, at half-past ten A.M., was appointed for such meeting, at the station of the Eastern R. R. in Everett; and on Tuesday, October 11, pursuant to assignment, the board (all the members being present) met the selectmen of Everett at the Everett station on the Saugus branch of the Eastern R. R., for the purpose of considering the matter of the relocation of the station. The selectmen appeared for the town, and submitted a vote of the inhabitants in favor of relocating the station at the foot of Prescott Street. A number of remonstrants against that location were also present, and the question was discussed by the parties interested. The proposed location was viewed, and the hearing was closed. Subsequently it was voted, that the board approves the relocation of the West Everett passenger station on the Saugus branch of the Eastern R. R. at the foot of Prescott Street, as proposed by the selectmen of Everett. Attest: Win. A. Crafts, clerk."

Joseph H. Cannell testified that he was the town clerk of Everett in the year 1882, and that he acted as clerk of the board of selectmen, but that he was not a member of that board, and had not been sworn as clerk of said board. He produced the records of the selectmen, and read their action in relation to said relocation, which was had in his presence, as follows: "Voted, that the West Everett depot on the Saugus branch of the Eastern R. R. be relocated at the foot of Prescott Street, in concurrence with the vote of the railroad commissioners."

No action on the part of the railroad corporation, except as herein appears, and no approval in writing by either the board of railroad commissioners or the selectmen of Everett, was given in evidence, unless said records constitute such approval in writing. After said proceedings by the board of railroad commissioners and the selectmen of Everett, the respondent acquired the land necessary for a station and its approaches, at the foot of Prescott Street, and erected a station thereon, which was completed and ready for use on December 18, 1882; and since that time the respondent's trains have stopped there, and not, as before, at Waters Street.

The relators contend that the acts of the respondent constituted in law an abandonment of said station, and that the respondent had not shown a relocation of said station in accordance with the provisions of law.

*C. R. Train* for the Attorney-General.

*R. Olney* for the respondent.

**MORTON, C. J.**—This is an information brought under the Pub. Sta. c. 112, § 156, which provides that “a railroad corporation **FACTS.** which has established and maintained throughout the year for five consecutive years a passenger station at a point upon its road shall not abandon such station;” and “in case of a violation of the provisions of this section, the Attorney-General, at the relation of ten legal voters of the city or town in which said station is located, shall proceed in equity by information to enjoin the corporation from further violation thereof.” The next following section provides that “a railroad corporation may relocate passenger stations and freight depots, with the approval in writing of the board and of the city council of the city or the selectmen of the town in which such stations or depots are situated.” By “the board” is meant the board of railroad commissioners, as appears by the Pub. Sta. c. 112, § 1. See also St. 1874, c. 372, § 117, of which this section is a re-enactment.

The policy of the law is to prohibit railroad corporations from abandoning stations and discontinuing the accommodations provided for the people when the station has existed for five years, without the sanction of the legislature, but to permit them to make minor changes in the location of stations, upon obtaining the sanction of the board of railroad commissioners and of the city council or selectmen. No general rule of law, applicable to all cases, can be laid down as to what change of a station will constitute an abandonment or a relocation. Every relocation involves in one sense an abandonment of the old station, and must, almost of necessity, be attended with inconvenience to some persons. It was the intention of the legislature to leave to the decision of the railroad commissioners and of the city council or selectmen, the question whether a relocation of a station proposed by a railroad corporation should be permitted. We need not decide whether a case might not arise in which this court could revise the proceedings of these boards, and hold that a change made by their permission as a relocation was in fact an abandonment of the station. The statute at least gives to them a large discretion to determine whether a proposed change is a relocation or an abandonment; and upon the facts of the case before us, they were clearly justified in treating the change of the station as a relocation within the statute.

The purpose and effect of the change was not to discontinue a stopping-place in the town of Everett, but merely to change the location of the station buildings to a place near by, in the same town and neighborhood, with the design of better accommodating the same community. Whether such a relocation was desirable, was a matter left to the judgment of the railroad commissioners and of the selectmen. The evidence offered by the relators as to the inconvenience of the change to

**ABANDONMENT  
OF STATIONS DIS-  
CUSSED.**

**RELOCATION OF  
DEPOT: REVIEW  
OF RAILROAD  
COMMISSIONERS  
DECISION.**



them and others, was proper for the consideration of these boards, but was not admissible to control their decision. If these boards have properly signed their approval of the relocation, we cannot revise their decision.

The relators contend that the relocation in this case was invalid, because the board of railroad commissioners and the selectmen have not given their "approval in writing" within the provisions of the statute. The purpose of the statute was to prevent the mischiefs which might arise if the questions of the legality of a relocation was made to depend upon uncertain oral testimony to show the sanction of these two boards. It requires, therefore, that their approval shall be in writing, but it does not prescribe that it shall be by a writing signed by them. The board of railroad commissioners is a board of public officers required to keep records and having a sworn clerk. The most appropriate way of expressing their approval of a relocation is by a vote passed and entered upon their records. A board of selectmen is not required by express provisions of statute to keep records, and its clerk, if it appoints one, is not a certifying officer. *Commonwealth v. McGary*, 135 Mass. 553. But it is a board which may act by vote, and a majority may bind the whole. It is usual and proper for selectmen to keep records or minutes of their votes and proceedings.

RELOCATION OF  
DEPOT: APPROV-  
AL OF RAILROAD  
COMMISSIONERS.

In the case at bar, the selectmen of Everett passed a vote in substance approving the relocation as approved by the board of railroad commissioners. They caused it to be recorded upon their book of records. Though entered by the clerk, it was their act, and the record of the vote was their approval in writing within the fair meaning of the statute.

The relators object to the vote of the board of railroad commissioners, because it states that the relocation was "proposed by the selectmen of Everett." But it is immaterial who proposes the relocation, and such recital cannot affect the substance of the approval. They also object to the vote of the selectmen, because, instead of approving the relocation by the railroad, it relocates the station. This is merely an error of form. In substance, the vote is an approval of a relocation to be made by the railroad.

Upon the whole case, we are of opinion that no abandonment of the old station is shown. The railroad corporation has relocated the station, having first obtained the approval in writing of the two boards, as required by the statute; and its proceedings were legal and valid.

Information dismissed.

**What Constitutes a Station within the Meaning of Statutes Relating to the Abandonment of Stations.**—In the case of the *State v. New Haven, etc., R. R. Co.*, 37 Conn. 153, the railroad company had built a platform at a place afterwards called "Brook station," for the accommodation of passengers,

and placed upon or near its southerly end an old baggage car with an opening which served as a doorway, which car served as a shelter or protection from the weather. No agent was ever appointed at said station, and no tickets were sold thereat, and no freight was ever way-billed from or to the station. But tickets were sold at other stations on said road to passengers for said station, and trains were stopped to take up passengers at said station when flagged so to stop, and mail trains stopped without being flagged. It was *held* that Brook's station was a station within the words of the statute relating to the abandonment of stations, and that a writ of mandamus would lie to compel the company to stop its trains at said station, even though the station was established by another company to which defendant company had leased its road. *State v. New Haven, etc., R. R. Co.* 37 Conn. 153.

But a mere platform, commonly called "Allen's station," at which the railroad company was in the habit of stopping one train a day each way on signal or at the request of passengers, but to which or at which no tickets were ever sold, and which was not mentioned in time-tables, placards, etc., is not a station within the meaning of the statute. *State v. New Haven, etc., R. R. Co.*, 41 Conn. 134.

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PERKINS

v.

CHICAGO, ST. LOUIS AND NEW ORLEANS R. R. Co.

(60 *Mississippi Reports*, 726.)

Where, in an action by a passenger for damages against a railroad company for injuries received as such passenger, it is shown that the train on which the plaintiff was a passenger was a freight train not intended for both passengers and freight, the plaintiff must show gross negligence on the part of the servants of the defendant before a recovery can be had in view of sec. 1054 of the Mississippi Code of 1886, which provides that "for injury to any passenger upon any freight train not being intended for both passengers and freight, such company shall not be liable except for gross negligence or carelessness of its servants."

A train which is strictly a freight train, with only the appliances and accommodations of such, cannot be said to be intended for both passengers and freight, even though all persons be permitted to become passengers by going into the conductor's caboose.

APPEAL from the circuit court of Madison County.

On the 3d day of November, 1881, the appellant purchased a ticket from the appellee, and took passage on a freight train on appellee's railroad from Jackson to Madison Station. The train stopped at Madison Station, the engine being opposite the station, and the conductor's caboose, in which appellant was riding, was something over a hundred yards from the platform of the station. No announcement was made by the conductor or any of the railroad employees that Madison had been reached. After the train

had thus stood some time, it pulled out, failing to stop as the caboose passed the station, and the appellant, having continued in the conductor's caboose, sent for the conductor, and demanded that she be taken back to the station. The conductor stopped the train, and "offered to carry the appellant to Canton and return her free of charge to Madison Station," but declared that it was impossible for him to push back to Madison, as he had a heavily-loaded train, and there was a passenger train in his rear. The conductor was polite throughout, and while conversing with the appellant was on top of the train holding a brake to steady the train. Appellant declined to go on to Canton, and got off the train where it had stopped, at Montgomery's Crossing, about one mile north of Madison. She remained there for some time until a conveyance could be procured, and went to her home. She brought this suit against the railroad company for \$15,000 damages. The court below instructed the jury that the facts in the case did not constitute gross negligence, and that if they believed from the evidence that the plaintiff took passage "upon a freight train merely," then that defendant would be liable only for gross negligence.

*R. C. Smith and Robt. Shotwell* for the appellant.

*W. P. & J. B. Harris* for the appellee.

CAMPBELL, C. J.—The train on which the appellant was a passenger was a "freight train, not being intended for TRAIN HELD A  
"FREIGHT"  
TRAIN. both passengers and freight" within the meaning of sec. 1054 of the Code of 1880, and the action of the circuit court upon the instructions was correct. The latter part of that section is a substitute for sec. 2 of the act of March 15, 1876 (Acts 1876, p. 265), which employed the terms "mixed" or "accommodation" trains, "run for the accommodation of both passengers and freight." A train which is strictly a freight train, with only the appliances of such a train, on which persons are not sought to be induced to take passage by the offer of other accommodations than are afforded by freight trains, cannot be said to be intended for both passengers and freight, although all persons may become passengers by going into the conductor's caboose. They who take passage on such a train cannot expect, and have no right to demand, the conveniences and attention required with respect to passenger trains or those intended by the carrier for both freight and passengers.

Judgment affirmed.

**Freight Trains Carrying Passengers.**—Where there are no statutory regulations, as in the principal case, the liability incurred by a railroad company for injuries received by a passenger, due to the negligence of the company, is the same, whether he be travelling on a freight or passenger train. This rule is upheld by the authorities. "Where a railroad company admits passengers into a caboose car attached to a freight train," said Appleton, J., in *Dunn v. Grand Trunk R. R.* 58 Me., 187, "to be trans-

ported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches at the time of the occurrence of the injury." *Edgerton v. N. Y. & A. R. R. Co.* 89 N. Y., 227.

The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of the defendant company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain and receiving from him the ordinary fare, they must be held justly responsible for negligence, or want of care, in his transportation.

The question before the court was, Whether the defendants were liable at all or not as common carriers? The defence was based entirely upon a regulation of the company. There was no question raised as to the general obligation of carriers. Indeed, none is raised at the argument. The counsel for defendants rest their defence on the rules of the company. The plaintiff had paid the usual fare for a first-class passenger. The defendants had received it, and had undertaken the transportation of the plaintiff in their freight train, during the course of which he was injured by their neglect or want of care. Under such circumstances, the judge said they could not "plead their regulation in release of their ordinary liabilities; but they were just as liable as if it had been a passenger train, and as if there had been no notice, provided plaintiff was not guilty of any fault or want of ordinary care himself."

Undoubtedly, a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, it is all those who embark in it have a right to demand. *The C. B. & Q. R. R. Co. v. Hazzard*, 26 Ill. 272. "We have said in the *Chicago and Galena R. R. Co. v. Fay*, 16 Ill. 568," observes Breeze, J., "that a passenger takes all the risks incident to the mode of travel and the character of the conveyance which he selects, the party furnishing the conveyance being only required to adopt the proper care, vigilance and skill to that particular means; for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords."

If there was any peculiar risk incident to transportation on a freight train, the counsel should have called the attention of the court to such special difference, whatever it may be. But "the responsibility of a railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried, or on the fact of payment of fare by the passenger." *Ohio & Miss. R. R. Co. v. Mahling*, 80 Ill. 9. "The evidence," says Walker, J., in that case, "shows that the road had been carrying passengers on their construction trains, and they must be held to the same degree of diligence with that character of train as with their regular passenger coaches for the safety of the persons and lives of their passengers."

"If the defendants claimed that they might exercise a diminished degree of caution arising from the character of the train, they should have requested a corresponding instruction." See, further, note *Burlington, etc., R. R. Co. v. Rose*, 1 Am. & Eng. R. R. Cas. 257.

RUCKER

v.

MISSOURI PACIFIC R. R. Co.

(61 *Texas Reports*, 499.)

A colored man coming to the station of a railroad company to take passage upon a train, seated himself on the pilot of the engine, and when asked by the conductor what he was doing there, stated that he had not enough money to pay his fare, but had given fifty cents to the fireman for permission to ride there. After the train started he was thrown off and injured by the engine running over a hand-car. The man was of ordinary intelligence. By the rules of the company, employees were prohibited from allowing passengers to ride in such a place. In an action to recover damages from the company,

*Held*, that the plaintiff had been guilty of such contributory negligence as precluded all right of recovery.

APPEAL from Grayson. Tried below before the Hon. R. Maltbie.

Suit to recover damages by the appellant for personal injuries received by him while a passenger on one of appellee's freight trains, laying his damages at \$10,000.

The appellee answered by general denial, and specially that the appellant's injuries were caused by his own negligence and want of care, etc. Verdict and judgment for the appellant.

It was admitted that passengers were carried on the train on which appellant was injured. The appellant was at Mineola at work; he lived in Sherman. On the day he was hurt he got a telegram from his wife, announcing the illness of his daughter and requesting him to come home. There was a passenger train at the depot, going in the direction that appellant would have to travel to get home, at the time he received the telegram. Before he got to the depot the train pulled out. There was a freight train at the depot, going in the same direction, and appellant testified that, approaching the train on the track from the direction it was going, and coming to the engine first, he ascertained that he could get passage on that train from the men standing near, who agreed to take him at a price agreed upon. When the train was about to start he was told to take his seat upon the pilot of the engine, which he did. He paid the fare required of him. The person who received him as a passenger directed him where to ride. The appellant was a full-blooded negro of about the average mental capacity of his race, born and raised a slave.

Appellant was hurt by the engine running over a hand-car, in a deep cut, just after the engine had rounded a short curve.

Appellant had lived in Sherman near the Central Railroad about

twelve years. He had traveled by rail before. He had worked at building the road on which he was injured. He testified that the reason he did not go back to the caboose and get on that was because he did not have time before the train started. It afterwards stopped at a water tank, but he still remained on the pilot of the engine. He first agreed with the person who directed him to sit on the pilot to pay him to ride from Mineola to Bells; but when, after starting, he came around on the engine to collect it, appellant induced him to carry him.

Other testimony indicated that the party who agreed to let him ride on the engine and collected the money from him was not the engineer, but the fireman.

Other facts are stated in the opinion. The charge in chief was as follows:

1st. "If you believe from the evidence that the plaintiff, while riding on the defendant's train, was injured and damaged through defendant's negligence, as is alleged in the petition, and that he was not guilty of negligence in the mode and manner of riding on said train, you will find for the plaintiff such actual damages as you believe he has sustained; and in making the estimate you may take into consideration his loss of time, whether permanently injured, any mental or bodily pain he has or may suffer, expense of medical or other attention necessary for his cure, etc.

2. "But if you believe that plaintiff's position on defendant's train was one of obvious danger, he cannot recover, and you will find for defendant."

The court refused the following instruction asked by plaintiff: "If you believe from the evidence that the position of plaintiff on defendant's train was dangerous, but that the plaintiff had not sufficient knowledge to distinguish between a place of danger and one of safety, and that he was directed by one of defendant's servants to ride where he did, and was told by such servant that it was a safe place to ride, his riding there would not prevent his recovery though it was in fact a dangerous place to ride.

"5. In order for you to find for the defendant on the ground that the place where the plaintiff was riding was one of obvious danger, you must believe from the evidence that it was obvious to the plaintiff, considering his capacity to judge of it, and all the circumstances by which he was surrounded, his experience and the acts and known experience of the defendant's servants."

The court instructed, at request of the railroad company, as follows: "The consent or direction of the engineer or fireman would not excuse or justify the plaintiff in occupying a position on the pilot of an engine, and the defendant would not be liable for any injuries received in consequence thereof; the position was one which a man with ordinary prudence would not have occupied.

"If the jury believe from the evidence that the position taken

by plaintiff on the pilot of the engine was obviously dangerous, and such as a person of ordinary prudence and discretion would not have occupied, they will find for the defendant notwithstanding they may believe defendant was ignorant of the danger, and that he had the consent of the fireman or engineer to ride in such position."

The appellant also excepted to the refusal of the court to give the following charge asked: "2. If you believe from the evidence that the plaintiff was riding in a dangerous place, and that it was known by defendant's servants in charge of the engine, and that he was injured by the negligence or want of reasonable care on the part of those in charge of the engine in the running and management of the engine and train, and that he would not have been injured but for such negligence and want of reasonable care, you will find for the plaintiff."

The accident was caused by the train running over a hand-car. He seems from the evidence to have voluntarily remained on his perilous seat until he was injured.

And also to its refusal to give the following: "If you believe the plaintiff was injured on account of the conduct of defendant's servants, though they acted without authority, and against the rules and regulations of the defendant, if the defendant, after notice of what had been done by its servants, ratified the acts of its servants, the defendant would, in that event, be bound by their acts."

At the request of the appellee the court instructed the jury: "3. Defendant is responsible for the acts of its agents so far as they were authorized to do such acts for defendant or were vested by defendant with apparent authority to do such acts for it, but no further. A locomotive engineer or fireman employed to manage the engine has no apparent authority by virtue of such employment to collect fares from passengers, or receive them for transportation on said engine. If the rules of defendant prohibit passengers from riding in the engine, and prohibit the employees in charge of it from permitting passengers to occupy such position, it would make no difference whether plaintiff knew of such regulations or of the danger of the position, defendant would not be liable for any injuries received by plaintiff while riding in such position, though he occupied it by the advice or consent of such employees of defendant, and was ignorant that it was not a proper place to ride.

"5. The plaintiff seeks to recover for injuries received while riding on the pilot of an engine on defendant's road. If the jury should believe that plaintiff had the consent of the engineer and fireman to ride in that position, and that he had paid either of them for the privilege of riding there, they should still find for the defendant, if the evidence shows that by the rules and regulations

of the company passengers were forbidden to ride in that position, and in such case plaintiff's ignorance of the rules and regulations could make no difference, and would not entitle him to recover; provided you believe such position was one of obvious danger."

*Paty, Smith & Woods* and *Wilkins & Cunningham* for appellant.

*R. C. Foster* and *A. E. Wilkinson* for appellee.

WEST.—After a careful consideration of this record, we have reached the conclusion that there is no material or serious error contained in it, and that the judgment should be affirmed.

The attending physician of appellant, who had fair opportunities of judging of his mental capacity and intelligence, testified that appellant had the ordinary intelligence of a full-blooded negro. There is nothing in the record going to show that he was an imbecile, or *non compos mentis*. There is also evidence in the record, and it was detailed in the hearing of the jury, that the appellant, without the knowledge of the conductor of the train, elected to ride on the pilot, near the cow-catcher, voluntarily and without advice from any one.

It was also in evidence that the appellant, when questioned by the conductor as to his motive in taking his seat on the pilot, gave as a reason that he did not have money enough to pay his fare, and that he had given the fireman a half a dollar to permit him to ride on the pilot.

Taking the whole case together, there is no serious error in the action of the court in giving or refusing instructions asked, or in its charge in chief to the jury.

There is evidence to support the verdict of the jury, and it is accordingly affirmed.

**Riding in Perilous place. Permission of Employees.**—It is a well established principle that a passenger who voluntarily and carelessly puts himself in a dangerous position is guilty of contributory negligence and cannot recover for injuries received. However, a distinction is made between persons who have sufficient intelligence to realize their perilous situation and those who have not.

Where a conductor directed a passenger to pass into another car, and in crossing the platform he was thrown from the train and injured, it was held that if he knew the movement was attended with danger he could not recover, as he was not bound to obey the order. *Louisville & Nash. R. R. Co. v. Kelly*, 13 Am. & Eng. R. R. Cas. 1.

So also where a drover was permitted by a station agent to ride on the top of a car, but without the authority of the conductor, the train becoming derailed and the party in question hurt, held that the station agent had no authority to authorize the party to ride where he did, which precluded his right of recovery. *Little Rock & F. S. R. R. Co. v. Miles*, 13 Am. & Eng. R. R. Cas. 10.

Riding on the engine of itself amounts to contributory negligence, even by permission of the engineer, so held in *Daggett v. Illinois Cent. R. R. Co.*



34 Iowa, 284. But see *Nashville & Chattanooga R. R. Co. v. Erwin*, 3 Am. & Eng. R. R. Cas. 465. Where a person having missed his train a few moments was invited by an employee of the company to ride on an engine about to leave, telling him that it would soon overtake the train at a bridge not far off, and, accepting the invitation, was injured by jumping from the engine to escape a collision which was imminent, it was held that he was not guilty of negligence, as the act of the employee was the act of the company.

**Riding on the Pilot.**—A case similar to the principal one is presented in *R. R. Co. v. Jones*, 95 U. S. 439. Jones was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were usually conveyed by the company to and from their work in a box car assigned to their use. One evening when about to return from work, being told by the director of the laborers to "hurry up and jump on anywhere," he placed himself on the pilot of the engine, which collided with some cars standing on the track and plaintiff was injured. There was ample room for him in the box car, and all in it were unhurt, held (1) That, as he would not have been injured had he used ordinary care and caution, he was not entitled to recover. (2) That knowledge, assent, or direction of the agents of the company as to what he did at the time is immaterial.

And in *Chicago J. R. R. Co., v. Michie*, 83 Ill. 427, it was held that a railway company is not liable for an injury to a person who was riding by stealth on the engine, in violation of the rules of the company, known to him, even though with the permission of the engineer. The conductor is the only train hand who can bind the company by assent to riding free. See note, 13 Am. & Eng. R. R. Cas. 28.

### LAWSON, Adm'r,

v.

CHICAGO, ST. PAUL, M. AND O. R. R. Co.

(*Advance Case, Wisconsin. September 22, 1885.*)

Where by special contract for the transportation of horses, one person is to be allowed to ride free with them to take care of them, such person, though not in strictness a passenger, is no trespasser or intruder, and the company owe him the duty to carry him safely by the exercise of reasonable care.

Where an agent has authority to bind his principal by a contract in writing, and he makes a verbal contract with one who does not know of the requirement as to writing, the principal will be bound.

The question of contributory negligence is one for the jury, and the court should not disturb a verdict finding for the plaintiff, unless the facts were such as to warrant the court in holding, as a matter of law, that the deceased was guilty of a want of ordinary care, and that such negligence *per se* contributed to his injury and death.

Where negligence on the part of the defendant is admitted on the pleadings, evidence as to the degree of negligence is still admissible.

The question whether a particular car was a dangerous place to ride in, is not a proper subject of opinion evidence.

APPEAL from circuit court, St. Croix county.

*L. P. Wetherby* and *R. H. Start* for respondent, etc.

*S. L. Perrin* for appellant.

ORTON, J.—One W. E. Fay, in the night-time of the twelfth of December, 1883, shipped on one of the freight cars of the appellant company, at New Richmond, 12 horses to be carried to Phipps Station, a distance of about 100 miles, and employed the deceased to ride in said car to care for said horses on the route. About 25 miles from New Richmond, at a station called Clayton, the train in which said car was placed met and collided with another train standing there at the time, and thereby the car in which the horses and the deceased were being carried was crushed in and broken, and the deceased so injured as to cause his death.

It is admitted in the answer that the collision which caused such death resulted from the fault of the servants of the company, and the jury found that the collision which caused it was occasioned by their gross negligence. It is alleged in the complaint that the said Fay entered into a contract with the company that said horses should be so transported for the usual charges, which were paid, and that it was agreed that John J. Lawson, the deceased, the employe of said Fay, should accompany said horses, and ride with them on said car, to look after their interests. It is substantially alleged in the answer that the company was accustomed to make with shippers of live-stock, at that time, written contracts by which the shipper assumed certain risks, and what contained other provisions favorable to the company, one of which was that the persons who were allowed to ride in the car with the stock should so ride at their own risk of personal injury from any cause whatever, and that no passes should be given to such persons, but that they should sign their names on the back of the contract; and no such contract was made in this instance with the said Fay, but that said Fay applied to the station agent at New Richmond for a car in which to ship horses, which car was provided for his use.

It is further alleged in the answer that, after the accident occurred and said Lawson seriously injured therein, the said Fay and the station agent at New Richmond made out and executed one of said written contracts, and signed the name of said Lawson on the back, without authority from the company, and that said Fay was not the owner of all of said stock, and that two other persons rode in said car with the deceased, and that the three conspired to obtain in this way a free passage. There was evidence that said Fay and the agent at New Richmond made the said verbal contract of shipment, which provided that one person should ride in the same car with the horses, to take care of them, and that said Lawson, the deceased, went into said car for such purpose, with the knowledge and consent of the conductor of said train, before the car was placed next to the tender in said train, and that Fay had no knowledge of any such customary written contracts in such cases.

There was no evidence whatever of any conspiracy between said

Lawson and the two other persons in said car with him to obtain a clandestine and free ride on said train. Whether said Fay was the owner of all of the 12 horses shipped was quite immaterial to the deceased, rightfully within said car, and was very properly omitted from the special findings and verdict of the jury. There was evidence tending to show that it was customary for the defendant company to carry at least one person free in a car-load of horses of such number, to take care of them, and that such person was useful in keeping horses so shipped quiet and from injury when the cars were in motion. This statement of the case is sufficient to make intelligible the positions assumed by the learned counsel of the appellant.

First. That there was no contract between Fay and the station agent that the deceased should accompany the horses in the car, so as to create the relation of carrier and passenger between him and the company. The learned counsel, in assuming that Lawson was a common passenger, or a passenger in the ordinary sense, if he had any right to ride on that train anywhere, and in citing authorities applicable to such a view of his relation to the company, scarcely meets the real question here presented. Lawson was, in a sense, a passenger; but he was more than a passenger. He held responsible relations to the stock in his care, and connected with it by the alleged contract of shipment. His place on that train was in the car with the horses, and to care for them, or it was nowhere; and he had no right to be carried on that train in any other place. He was to be carried free and without charge, because he was to be carried in that way. He had no right to be carried in the caboose, or in any other car or place on that train, according to the agreement and understanding of the agent, Gault, and Fay. It was quite immaterial that the deceased was not at the time named as the person to ride in the car with the horses. By the agreement, Fay was authorized to place one person in the car with the horses to take care of them, and the agent did not see fit to have such person named, as he might have done, and Fay carried out the agreement by placing the deceased in the car for such purpose, with the knowledge and assent of the conductor of the train. It is too plain for argument that the deceased was rightfully in the car under the agreement, and was no intruder or trespasser, and the company owed him the duty to carry him there safely by the exercise of reasonable care. The custom of the company in other cases of carrying horses, and with them in the same car some person to take care of them on the route, repels the idea that this case was extraordinary or exceptional. The authorities cited by the learned counsel of the appellant related to common passengers who voluntarily placed themselves where they had no right to be under the contract for their carriage. This is a different case. The deceased occupied the

MAN WITH  
HORSES IN CAR:  
RELATION TO  
COMPANY.

very place where he should have been, and was connected with the live-stock carried so intimately that they could not properly be separated without possible danger to it from the want of his personal care and attention. There are special circumstances attending such a case not present in cases of common passenger carriage. In the case cited by counsel for appellant of *Eaton v. Railroad Co.* 57 N. Y. 382, it was held that the conductor of a coal train who invited a person to ride thereon free did not bind the company, or create the relation of carrier and passenger between such person and the company. In the opinion in that case, however, cases are cited approvingly of persons riding on gravel trains, "under certain circumstances," who might recover for injuries occasioned by collision.

Second. Had the station agent authority to agree with Fay verbally to carry his horses on a freight car, and one person with them to take care of them? It is insisted by appellant's counsel that the station agent had no authority to make such verbal agreement, and had authority only to make such customary written stock contract as set out in the answer. There is very little, if any, substantial difference between the agreement made and the one which it is admitted the agent had authority to make. Both provide for the carrying of one person, with such number of horses on the same car, without charge. The signing of such person's name on the back of the written contract could have no effect except to bind such person to the stipulation that he was to take the "risk of personal injury from any and every cause whatever." Such a stipulation would not have exonerated the company from liability in case of gross negligence. *Black v. Goodrich Transp. Co.*, 55 Wis. 322; s. c., 13 N. W. Rep. 244, and cases there cited. The difference between the contract made and the one that the counsel of the appellant now contends ought to have been made is merely formal, and the authority of the agent to make substantially the contract that he did make is virtually conceded. That class of cases relied upon by the appellant's counsel to show that the agent of a carrier company cannot bind the company by contract in violation of his instructions, or outside of the legitimate scope of the particular business with which he is intrusted, is inapplicable to this case. The law is well settled that if the agent had authority to make such a contract, and in making it he violates his special instructions as to the mere form of it, of which the shipper has no notice, the company is bound. If the agent has the general authority to make certain contracts, but is restricted by private instructions not known to the other contracting party, as to the manner of making them, the principal is bound. This rule is based on the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealing with agents. Story, Ag. §§ 73, 126, 133.

STATION AGENTS'  
AUTHORITY TO  
CONTRACT TO  
FURNISH CAR FOR  
HORSES.

Much stress in the argument is laid upon the want of authority in the conductor to permit or allow the deceased to ride in the car with the horses. This question is not of much importance when it is clear that, if the testimony of Fay and Marvin is to be believed,—and the jury had the right to believe it,—the deceased was rightfully in that car by contract and understanding with the agent, and, by other testimony, such a contract was sanctioned by previous custom. There was evidence that the deceased was allowed and permitted by the conductor to so ride, or, at least, that he knew of it and assented to it. It having been customary for a person to so ride in company with horses carried upon said road, the conductor's authority to grant such permission would seem to fall within his general authority in the management and control of the train. *Bass v. Railway Co.*, 36 Wis. 463; *Craker v. Railway Co.*, Id. 670; *Railway Co. v. Ross*, 112 U. S. 377; s. c., 5 Sup. Ct. Rep. 184.

We conclude, therefore, that the deceased was rightfully a passenger upon said train under peculiar circumstances, sanctioned both by the contract and custom of the company. What has already been said supports the ruling of the circuit court in rejecting the evidence offered to prove what were the private instructions of the company to its agents, as to the form in which such contracts should be made, without showing or offering to show that Fay had knowledge of them.

Third. Did the deceased by his negligence contribute to the injury which caused his death? This was a proper question for the jury to decide, and their verdict should not be disturbed unless the facts were such as to warrant this court in holding, as a matter of law, that the deceased was guilty of a want of ordinary care, and that such negligence *per se* contributed to his injury and death. *Whart. Neg. §*

RIDING IN CAR  
WITH HORSES,  
WHETHER CON-  
TRIBUTORY NEG-  
LIGENCE.

420 *et seq.*; *Railroad Co. v. Kirk*, 90 Pa. St. 15; *Karasich v. Hasbrouck*, 28 Wis. 569. Was it so unusual and so clearly dangerous for the deceased to have been carried in that car with the horses, and was his riding therein so much the cause of his injury that it can be said without hesitation that he was guilty of a want of ordinary care which contributed to his injury? Can it be said that an ordinary prudent man would not have done so? We think not. When the deceased entered the car he had a right to suppose it would be placed in a safe and proper position in the train. But the company's servants placed it next to the tender, and by reason thereof it was the only car in the train that was demolished by the collision. It was customary for other men to so ride in the car with horses, and the injury to such, occasioned thereby, is not so frequent as to make such a place necessarily or probably dangerous. The testimony was that it was proper and useful for some one to so ride with horses to take care of them, and quiet

them, and keep them from injury. Such service would seem to be a reasonable, as well as common, if not a necessary, employment. The deceased could not have been carried in the caboose, or anywhere else on that train, consistently with his employment. He was in the car with his horses in the discharge of his duty, and, as we have seen, he was rightfully there. The jury properly found that he was not guilty of a want of ordinary care in riding in the car in which he received his injuries, which contributed directly to the injury, and that he was not asleep at the time of the accident. They also found that he entered that car for the purpose of caring for the stock during the journey, and that it was usual on that road for men in charge of stock of this kind, and loaded as this was, to ride in the car with such stock. These findings we cannot disturb. There was no evidence whatever that the deceased entered the car with the horses clandestinely, or to steal a ride, or to defraud the company, and therefore the authorities applicable to such a case have no force.

The respondent was allowed to show the circumstances of the collision, against the objection of the appellant, in order to show that the servants of the company were guilty of gross negligence. According to the brief of the learned counsel of the appellant, "it made no difference in the case, so long as defendant was negligent. If plaintiff showed herself otherwise entitled to recover, she could only be defeated by showing negligence on her husband's part." This being so, proof of gross negligence was immaterial and could do no harm. But we think proof of the accident and its circumstances was proper, and that it justified the finding of gross negligence. The negligence of the company was charged in the complaint and admitted in the answer, but its degree was an open question for the jury. This disposes of the main questions raised in the brief of appellant's counsel. Then, as special exceptions, which will be briefly noticed: (1) The instruction refused in respect to the deceased having voluntarily placed himself in a dangerous position on the train, and thereby contributed to the injury, was refused and qualified so as to embrace the element of common prudence. This was correct, for all places about a railroad train are more or less dangerous in case of a collision. (2) What conversation occurred between Marvin and the agent in the presence of Fay in relation to persons riding on the car with the horses, including the deceased, and before he had gone into the car, was a proper question to show the contract, and was a part of *res gestæ* as far as it related to the right of the deceased to so ride, and as to the others it was immaterial. (3) The rule of prospective damages to the respondent by the loss of her husband, and the evidence to prove it, seem to be fully sanctioned by *Potter v. Railway Co.*, 21 Wis. 372; *Castello v. Landwehr*, 28 Wis. 522, and according to the rule elsewhere. *Donaldson v. Railroad Co.*,

18 Iowa, 280; *Rowley v. Railway Co.*, L. R. 8 Exch. 222; *Rorer*, R. R. 1167. (4) The testimony of the witness Reed was properly stricken out, because the deceased was not bound by the statements of others in the car with him after the accident, a conspiracy between them not having been shown. (5) The court properly refused to allow witnesses to give their opinions that the car in which the deceased rode was a dangerous place. This was a question solely for the jury to decide on all the facts.

There were some other exceptions, but not important or pressed on the argument.

This case was very ably and fully tried. The rulings of the court and the charge to the jury were considerate and judicious. The findings of the jury are all supported by competent evidence. The judgment of the circuit court is affirmed.

**Riding with Stock.**—Where a cattle dealer paid no independent consideration for his own conveyance, but accompanied his cattle under a contract stating that they were to be carried at a reduced rate, and providing that "the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause." *Held*, that such contract was lawful. *Bissell v. New York, etc.*, R. R. Co., 25 N. Y. 442; *Boswell v. Heidson*, etc., R. R. Co., 5 Bosw. (N. Y.) 699. In another case defendant received of plaintiff at N. a car load of sheep, to be transported to A., under a contract which contained a clause by which plaintiff agreed to go or send some one with the sheep "who should take all the risks of personal injury from whatever cause, whether of negligence of defendants, its agents, or otherwise." After the sheep were loaded, plaintiff who was intending to accompany them, and had a drover's pass, in passing by the tender of the engine was injured by a stick of wood negligently thrown therefrom. *Held*, that under the contract the company was not liable. *Poucher v. New York, etc.*, R. R. Co., 49 N. Y. 263. But see *Cleveland, etc.*, R. R. Co. v. *Curran*, 19 Ohio St. 1; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 815; *Flinn v. Phila.*, etc., R. R. Co., 1 Houst. (Del.) 469; *Smith v. New York, etc.*, R. R. Co., 24 N. Y. 222; 29 Barb. (N. Y.) 132; *R. R. Co. v. Lockwood*, 17 Wall. 357; *Ohio, etc.*, R. R. Co. v. *Selby*, 47 Ind. 471.

In *Jenkins v. Chicago, etc.*, R. R. Co., 41 Wis. 112, the owner of certain horses and goods, destined for the village of L., shipped them in a common box car of the defendant, which was to run on defendant's line to A., and thence on its branch road to L. Plaintiff, who was employed by the owner to accompany him and aid him in taking care of the property, rode with it in the box car to A., with the knowledge and consent of the conductor who ran the train to that point, and such conductor, in fact, received fare for plaintiff's ride from A. to L. (which was not on his run), though he had no authority to do so. Some hours after the arrival of the car at A., when the train of which it was then a part was about starting for L., plaintiff went into the car without the knowledge or consent of the conductor or other persons in charge of that train, and without doing anything to bring the fact to their attention before the accident complained of. Before the train started the car was locked by one of defendant's employees; and afterwards, while in motion, goods therein took fire through defendant's alleged negligence, and plaintiff was injured before he could procure the door to be opened. It was *held* that defendant was not chargeable with notice of plaintiff's presence in the box car by reason of the knowledge possessed by the first conductor.

The presumption of law is that persons riding upon trains of a railroad

which are palpably not designed for the carriage of persons are not lawfully there, and if they are permitted to be there by the consent of the carriers' employees, the presumption is against the authority of the employees to bind the company by such consent. But these presumptions may be overthrown by special circumstances; and where the company would derive a benefit from the presence of drovers upon its cattle trains, and may have allowed its employees upon such trains to invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown. *Waterbury v. New York Central, etc., R. R. Co.*, 17 Fed. Repr. 671.

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LOGWOOD *et ux.*

v.

MEMPHIS AND CHARLESTON R. R. Co.

(*Advance Case, U. S. Circuit Court, W. D. Tennessee. March 18, 1885.*)

Equality of accommodation does not mean identity of accommodation, and it is not unreasonable, under certain circumstances, to separate white and colored passengers on a railway train, if attention is given to the requirement that all paying the same price shall have substantially the same comforts, privileges, and pleasures furnished to either class.

ACTION for the wrongful exclusion of a passenger from a railroad car.

Logwood and wife are colored people living in Huntsville, Alabama. She bought a first-class ticket over the defendant's railroad to Courtland, but when she went on the platform of ladies' car a brakeman, who had allowed several white ladies to enter, closed the door on Mrs. Logwood, and told her she must apply to the conductor of the train for permission to ride in that car, and that she could take a seat in the front car. According to her testimony, and that of her witnesses, the conductor told her she must ride in the front car; that she told him she had always been allowed to ride in the ladies' car, and thought she should be permitted to do so again, as she was sick, and did not wish to ride in the front car, where there was swearing and smoking and whisky drinking, but that the conductor insisted upon her riding in the front car, and told her he would see that there was no swearing, smoking, or drinking.

According to the testimony of the conductor and the defendant's other witnesses, he told her he was busy then, but had always allowed her to ride in the ladies' car, and if she would be seated in the front car until he got through he would put her into the ladies' car. She ordered her trunk off the baggage car, refused to take that train, and under instructions from her husband



kept her ticket, bought another, and went to her destination on the next train in the ladies' car. Both Mrs. Logwood and the conductor testified that she had often travelled with him, and always rode in the ladies' car. The car in the rear was reserved for ladies, and such other passengers as were admitted to it. The front car was a general one, in which smoking was permitted, but on this particular occasion, according to the testimony of defendant, was newer and brighter, and in all respects equal to the rear one in appearance and comfort. Colored people were generally required to ride in the front car, unless objection was made by them, in which case proper persons were allowed to ride in the ladies' car, the plaintiff always having been permitted to do so.

*W. H. Randolph* for plaintiffs.

*Poston & Poston* and *L. W. Humes* for defendant.

**HAMMOND, J. (charging the jury orally).**—Common carriers are required by law not to make any unjust discrimination, and must treat all passengers paying the same price alike. Equal accommodations do not mean identical accommodations. Races and nationalities, under some circumstances, to be determined on the facts of each case, may be reasonably separated; but in all cases the carrier must furnish substantially the same accommodations to all, by providing equal comforts, privileges, and pleasures to every class. Colored people and white people may be so separated, if carriers proceed according to this rule. If a railroad company furnishes for white ladies a car with special privileges of seclusion and other comforts, the same must be substantially furnished for colored ladies. All travellers have to submit to some discomforts and inconveniences, and should not be too exacting, but are entitled to polite treatment, free from any kind of indignity.

UNJUST  
DISCRIMINATION—  
COLORED  
PEOPLE.

The brakeman on the train having referred Mrs. Logwood to the conductor, who was the proper officer to decide upon her right to ride in the ladies' car, and she having gone to him, the question in this case must be determined by what occurred between them; and if you believe from the proof that the conductor ratified the act of the brakeman by telling her she must ride in the front car, and would not be permitted to go into the ladies' car, the company is undoubtedly liable for damages, unless you conclude from the evidence that the front car was, under the rule already announced, equal to the ladies' car. But if you believe that the conductor told her that at his convenience he would admit her to the ladies' car, and there was no unreasonable delay or discomfort in so doing, the plaintiffs cannot recover in this case.

See *Little Rock, etc., R. R. Co. v. Miles*, 18 Am. and Eng. R. R. Cas. 28.

21 A. & E. R. Cas.—17

MURPHY

v.

WESTERN AND ATLANTIC R. R. Co. *et al.*

(*Advance Case, U. S. Circuit Court, E. D. Tennessee, S. D. April Term, 1885.*)

A railroad company may set apart certain cars to be occupied by white people, and certain cars to be occupied by colored people; but if it charges the same fare to each race it must furnish substantially like and equal accommodations.

It is the duty of a railroad company to protect its passengers from insult and injury so far as it can; and if the conductor and brakeman on a train conspire with passengers thereon to remove another passenger who has a right to be on such train, or see such passengers eject their fellow-passenger, and make no effort to prevent it, or make no attempt to repair the mischief by restoring him to his seat, the company will be liable.

While a railroad company is held to a rigid accountability as to its duties to its passengers, a passenger is required to demean himself in such a way as not to be offensive, vulgar, obscene, or coarsely disagreeable to his fellow-passengers, or expose them to suffering or danger; and if he fail in these respects he may be removed by the train-men from the train; and in such removal they may use as much, and no more, force as is necessary to his removal.

A passenger who enters a car and forcibly ejects a fellow-passenger therefrom is liable therefor.

If a colored man enters a car set apart for white people with knowledge of that fact, so that he may be removed from the car and train for the purpose of bringing suit for damages against the railway company for such removal, the jury may consider that fact in mitigation of damages, and should not allow liberal and exaggerated compensation for his mental sufferings; but if no such intention appears, he may be allowed full and liberal compensation for his sufferings and other injuries, and such sum as punitive damages as the jury may think right in preventing the recurrence of the like mischief.

CHARGE to jury.

*W. J. Clift* and *Wheeler & Marshall* for plaintiff.

*Clift, Bates & Cooke* for defendants.

KEY, J.—In order to be prepared to decide legal controversies justly, the judge and the members of the jury should be careful to avoid the influence of partiality or prejudice. We belong to the white race, while the plaintiff is a colored man. During the entire period of our recollection there have been bitter controversies and conflicts over the condition and circumstances and rights of the colored race in this country. From these much bad blood, hostile feeling, and prejudice have resulted. Indeed, race prejudice, in all ages and in all parts of the earth, has been the fruitful source of animosity and war. On the other hand,

RACE PREJUDICE  
DISCUSSED.

the principal defendant is a railroad, and in this State, as well as in a great part of our country, railroads have been the subject of much denunciation and abuse, and of popular hatred. It is your duty to steer clear of all these influences upon one side as well as the other, and I believe you will do so. The ancients often painted Justice as blindfolded, so that parties could not be seen, and holding the scales with even hand. So we should be careful not to know the parties to this suit, and to try the cause as the law and testimony demand.

Railroads have become the great instrumentalities by which the transportation of freights and passengers is conducted. The immensity of their business and extent of their powers make them the anxious objects of legal authority and regulation. They are, in a large sense, public institutions subject to public control. This regulation and control must be reasonable. The nature and vastness of their business require great skill, judgment, discretion, and capital, and they must be allowed to use and exercise the means and powers necessary to the conduct of their business.

The plaintiff in this case says that he purchased a first-class ticket for his passage over the Western & Atlantic R. R. from Dalton, Georgia, to Chattanooga, Tennessee; that he took his seat in the rear car of the train without objection; that after the train started the conductor came to him and told him that people of plaintiff's color were not permitted to ride in that car, and that he must go forward into another car; that he offered the conductor his ticket, but the conductor declined to take it, and plaintiff refused to go into the forward car; that the conductor afterwards sent the porter of the train, who was a colored man, for his ticket, and he gave it to him. Not far from the same time, he says, a brakeman came to him and told him that colored people were not permitted to ride in that car, and asked him to go forward, but he refused, and the brakeman took plaintiff's baggage, without permission, into the forward car; that on the departure of the train from a station between Dalton and Chattanooga, two passengers, who took the train at that station, came to his seat and seized him roughly, and told him he must go into the other car, and dragged him from his seat, to which he clung as long as he could; and that, in doing so, his hand was bruised or lacerated so that it bled and pained him for some time after, and his back was wrenched so that he could do nothing for some days. These men hurried him forcibly out of the car into the forward car. That the officers and employees of the train did not interfere, though some of them saw the transaction, to prevent its occurrence. These passengers left the train at the next station, and one of them, and the conductor and a brakeman of the train, are sued along with the railroad.

The defendants do not controvert or deny that the material state-

ments of plaintiff are true. Defendants' witnesses say that the rear car of the train was reserved as a car for ladies and those who escorted them. There were no ladies in the car; the car had few passengers, and none of them accompanied ladies. No ladies entered the car until the train reached the station upon leaving which he was ejected from the car. The train-men saw the plaintiff ejected from the car; did not interfere; did not say anything about it then or afterwards to plaintiff, or those who did eject him. The train-men say they did not conspire with those who removed plaintiff, or have any knowledge or understanding that plaintiff was to be driven from the car. According to the testimony of defendants, the young man who sold newspapers, fruits, etc., on the train, styled by the witnesses "The Butcher," and who was not in the employ of the railroad, but in that of the Southern News Company, was the active party in fomenting the trouble upon this occasion. He is examined as a witness for the defendants, and shows evident pride in the part he performed. According to his account, he discovered that the train-men were not sufficiently resolute in turning the plaintiff out of the car. He appealed to the passengers to aid him in doing so. They told him that they had no objection to plaintiff's retaining his seat, as he had as much right to his seat as they had to theirs. When the train arrived at Ringgold, Georgia, two gentlemen took passage on the train, accompanied by ladies. This witness told them that they had better not enter the ladies' car, as there was a negro in it, whereupon these two passengers joined the news "Butcher" in the expulsion of the plaintiff.

My observation has convinced me that those who are most sensitive as to contact with colored people, and whose nerves are most shocked by their presence, have little to be proud of in the way of birth, lineage, or achievement. I cannot tell how these things are as to this witness. There is no controversy as to the facts in this case. I am of the opinion that a railroad company may set apart a particular car for the use of ladies and those accompanying them, and exclude all other passengers from it. But the plaintiff was not ejected from this car because he was accompanied by no lady, but because he is a man of color. Had he been accompanying a lady, the result, as to him, would have been the same, and she would have been required to go with him. Colored people, whether male or female, were not allowed to ride in the ladies' car. Again, I believe that where the races are numerous, a railroad may set apart certain cars to be occupied by white people, and certain other cars to be occupied by colored people, so as to avoid complaint and friction; but if the railroads charge the same fare to each race, it must furnish, substantially, like and equal accommodations. The money of one has the same value as that of the other, and should purchase equal accommodations. There is no equality of right when

FACILITIES: DIS-  
CRIMINATION  
IN CARS FOR  
LADIES AND FOR  
COLORED PEOPLE

the money of the white man purchases luxurious accommodations amid elegant company, and the same amount of money purchases for the black man inferior quarters in a smoking-car. The law does not tolerate such discrimination on the part of a railroad company. The carrier may furnish second or third class accommodations when he charges fare accordingly. Then the passenger may choose whether he will purchase a first, second, or third class ticket, and cannot complain when he receives that which he purchased. But if the carrier sells none but first-class tickets, he must give none but first-class accommodations, unless there arise emergencies when it is impossible or unreasonable for him to do so.

A train with but two cars in which passengers could go, as in this case, and in which the ladies and their friends had one exclusively, the other car being used for smoking and for gentlemen without lady friends, does not give like accommodations to all. The passenger from the rear car may go into the forward car and smoke, but the passenger in the forward car cannot go into the rear car for any purpose. He cannot go into it to smoke, or to escape the smoke, however offensive to him. Nor can a colored man and woman, of genteel appearance, good repute, and good behavior, who have paid for first-class passage, be sent to the smoking-car simply because they are black. As well might all red-headed men be excluded from the ladies' car because their heads are red. A railroad company may make all needful rules and regulations in the conduct of its affairs, but such rules must be reasonable and impartial—fair to all. If it separate passengers upon the color-line, it must treat each alike from the intrusion of the other. If it give white people one end of a car and colored people the other end, and exclude colored people from the white end, it must also exclude white people from the colored end. A passenger has no right to select the car upon which he will travel without direction or interference on the part of the carrier. When he proposes to take the train the train-men may designate the car which he may enter, and he has no right to complain if such car is as comfortable and convenient in its equipment as the others of like character. But if the train-men leave the cars in an accessible shape, and the passenger enters without opposition or objection, and selects an unoccupied seat, and places himself in it after having purchased the ticket or paid the fare required for a seat in such car, that seat, or so much of it as is necessary for him to occupy, becomes his for the trip, unless he be promptly notified to the contrary, especially as against another passenger who afterwards comes upon the train.

The defendant, who was a passenger, and as such entered the car and forcibly removed the plaintiff from his seat and ejected

LIABILITY OF  
PASSENGERS FOR  
EXPELLING FELLOW-PASSENGER.

him from the car, had no right to do so, and is liable for the injury. Moreover, it is the duty of the railroad company to protect its passengers from insult and injury as far as it can. If a mob, or some other power or force, the agents of the road cannot overcome or oppose or resist with success, or any reasonable prospect of it, injures the passenger, the road is not liable; but if he be injured by something which the exercise of diligence, activity, and courage would have prevented, and the officers of the train fail to make an effort to prevent the mischief, the road is liable. If the conductor and brakeman conspired with the passengers to remove the plaintiff, the railroad company is liable; or, if these agents of the road saw what these passengers were doing to their fellow-passenger, and made no effort to prevent the mischief, gave it no discountenance, or made no attempt to repair the mischief by restoring the plaintiff to the seat from which he was removed, the railroad company is liable. The conductor and one of the brakemen are sued along with one of the passengers who removed plaintiff, and with the railroad company. If these two persons conspired and confederated with said passengers to eject the plaintiff from his seat and from the car, or gave them aid and encouragement in so doing, or were present to aid and encourage, they would be personally liable. But if they did not so conspire or aid, nor were present to aid, but merely failed to prevent the act, they are not personally liable, as there was no legal personal obligation resting upon them to interfere; but if they failed to do their duty as agents of the railroad company, by reason of which plaintiff was injured, the company would be liable.

If you find against the defendants, or any of them, you may give such an amount as damages as, in your judgment, will compensate the plaintiff for his physical and mental suffering, and for his loss of time and necessary expenses, as a compensation for his injury; and then, if you think the circumstances justify it, you may allow such an additional sum as you think proper as exemplary damages. It is proper for me to say, however, that while a railroad is held to a rigid accountability as to its duties towards its passenger, there rests upon the passenger certain duties. It is required of him not to be offensive, vulgar, obscene, or coarsely disagreeable to his fellow-passengers. It is expected of him that he demean himself in such way as not to outrage the feelings of his fellow-passengers, or expose them to suffering or danger. If he fail in these and other respects I need not mention, the train-men may remove him from it, and use as much, and no more, force as is necessary to his removal. Now, should you conclude that the plaintiff is entitled to damages against any of the defendants, and you should believe from the proof that the plaintiff placed himself in the car and pursued the course he did so

DAMAGES FOR  
BEING EXPELLED  
FROM CAR.

that he might be removed from the car and train, for the purpose of bringing a suit—if he sought and desired what followed—he is not entitled to exemplary damages; nor would a jury be justified in allowing him liberal or exaggerated compensation for his mental and physical sufferings. If he sought and desired that which befell him, that fact goes in mitigation of his damages. If there is no evidence which convinces you that such was his purpose, you should give him full and liberal compensation for his sufferings and other injuries, and may allow him such sum as punitive damages as you may think right in preventing the recurrence of a like mischief.

The jury rendered a verdict against the passenger defendant and the railroad company for \$217, and in favor of the conductor and the brakeman.

As to separation of colored and white passengers, see *Summit v. State*, 9 Am. & Eng. R. R. Cas. 304; *Button v. Atlanta, etc.*, R. R. Co., 18 Am. & Eng. R. R. Cas. 398.

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## HOUSTON AND TEXAS CENTRAL R. R. Co.

v.

HILL.

(*Advance Case, Texas. 1885.*)

A cause of action consisting as well of the right of the plaintiff as of the injury to that right, where plaintiff's right accrued by reason of a contract made with defendant in G. county, and injury arose from a breach of that contract, which contract was to be partly performed in said county, and was wholly broken, a cause of action arose, and the suit was properly instituted in said county.

A contract made with a general passenger agent of a railroad entrusted with the supervision of its passenger business, and a part of that business being to make arrangements and special contracts for excursions, is binding on the company.

No private instructions given by the company to such agent, and not brought to the knowledge of the party contracting with him, as to the matter within the scope of his authority, would affect the right of such party to have the contract carried out and performed.

A railroad company may bind itself by contract to transport passengers or property beyond its own line.

These damages are such as are incidental to and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract.

*O. T. Holt* for appellant.

*J. B. Stubbs* and *Ballinger, Mott & Terry* for appellee.

APPEAL from Galveston Co.

WILLIE, C. J.—The Revised Statutes provide that suits against a private corporation may be commenced in any county in which the cause of action, or any part thereof, arose. *Rev. Stats. art. 119, sub-div. 21.* This court has held that a cause of action consists as well of the right of the plaintiff as of the injury to that right. *Philip v. Blythe, 12 Texas, 127.*

The right of the plaintiff in this cause accrued by reason of his contract with the defendant, which was made in Galveston county. The injury arose from a breach of that contract, and as the contract itself was to be in part performed in that county, and was wholly broken, a cause of action arose there, and the suit was properly instituted in Galveston county.

We think the charge of the court clearly and correctly submitted the law of agency as applicable to the contract made by the appellee with Gray, the general passenger agent of the appellant company. If Gray was the general passenger agent of the company, and that particular officer was entrusted with a general supervision of their passenger business, and a part of that business was to make arrangements and special contracts for excursions and like occasions, then a contract of that kind made with such agent would be binding upon the company.

Upon well recognized principles of law no private instructions given by the company to such an agent, and not brought to the knowledge of the party contracting with him, as to a matter within the usual scope of his authority, would affect the right of such party to have the contract carried out and performed. *Story on Agency, secs. 73, 106, 433; Sewing Machine Co. v. Mo. Pac. R. R. Co., 70 Mo. 672.*

It is the duty of the party contracting with the agent to inform himself as to whether or not the contract proposed to be made is within the usual or ordinary powers of the agent, and then, if he has no reason to suppose that these powers have not been restricted in the particular instance, he may contract as safely with the agent as with the principal himself. It appears from the evidence that Gray was held out to the world as having a general authority to do all acts in a particular line of railroad business. In such cases the railroad company is bound by his acts in executing the authority, though it may have privately limited that authority, or he may have acted in violation of his duty. *Story on Agency, sec. 73.*

The doctrine is now firmly established, and has been long acquiesced in and acted upon, that a railroad company may, by contract, bind itself to transport passengers or property beyond its own line. *S. M. Co. v. M. P. R. R. Co. supra; Lawson on Cont. of Car. secs. 229, 230; Lindly v. R. & D. R. R.*

COMMENCEMENT  
OF SUITS AGAINST  
CORPORATION.

CAUSE OF ACTION

AUTHORITY OF  
GENERAL PAS-  
SENGER AGENT.

PRIVATE IN-  
STRUCTIONS TO  
AGENT.

DUTY AS TO AS-  
CERTAINING  
POWERS OF  
AGENT.

CONTRACT RE-  
FORD TERMINE  
VALID.



Co. 9 Am. and Eng. R. R. Cas. 31; *Cummins v. Dayton & N. R. R. Co.*, Id. 36. The railroad company, having power to bind itself by such contract, and the general passenger agent being the party through whom they are usually and ordinarily made, and the contract made by that agent with the appellee being of this character, it must be held binding upon the appellant, and that the latter is liable upon its breach for such damages as are allowed by law for the violation of contracts of this character.

The only remaining question in the case of any importance is as to the damages which the plaintiff below was entitled to recover for a breach of the contract by the company. There is no allegation in the petition that would bring the case within the rules of damages, as laid down in cases of tort, and it must be considered under rules applicable to contract alone. The contract was to transport passengers from Galveston and other points between Galveston and Dallas to the latter place and return for \$5 for each passenger thus transported. It was made with the company's agent October 27, 1883; its performance was to commence on November 2d thereafter, and the passengers were to be returned by the twelfth of the same month. No limit seems to have been placed upon the number of passengers to be carried on the excursion. The occasion of the proposed visit to Dallas was a match game or games of ball, together with horse races and other attractions to take place at the latter place, at or about the time the excursionists would arrive.

DAMAGES FOR  
FAILURE TO PER-  
FORM EXCURSION  
CONTRACT.

October 31, 1883, the defendant repudiated and disavowed the contract made with Hill by its agent, and notified the former that it would not be respected or carried out. The damages claimed by the plaintiff were the profits which he would have derived from the contract had it been carried out by the company according to its terms.

This is no doubt the true measure of damages in the case, as now well settled by the great weight of authority. The principle is that announced in *Hadley v. Baxendale*, 9 Exch. 341, and adopted by this court in all cases where the question has been brought up for adjudication. *Cavitt v. McFadden*, 13 Tex. 326; *Jones v. George*, 61 Tex. 345. It is in effect that these damages are such as are incidental to and caused by the breach, and may reasonably be supposed to have entered into the contemplation of parties at the time of making the contract. *Williams v. Barton*, 13 La. 410.

INCIDENTAL DAM-  
AGES CONTEM-  
PLATED.

It is useless to announce a proposition so plain as this, that a party making a favorable contract, from the performance of which he would ordinarily, and in the usual course of things, derive profit, is damaged to the extent of the profits that would thus arise in case of a non-performance of the contract by the parties with whom he dealt. Such profits are naturally incident to the con-

tract, and must have been within the contemplation of the contracting parties.

What then were the profits which the plaintiff would have derived from a performance of the contract? He claims in his petition that he had sold 2000 tickets at \$2 net advance on the price he was to pay for them, thereby losing a profit of \$4000, and that he could have sold 3000 more at the same advance, making to him an additional profit of \$6000. These allegations, so far as proven by proper evidence, would doubtless form an appropriate basis for a recovery of such damages as would compensate the appellee for his loss by reason of the broken contract.

How far were the allegations sustained by the evidence? As to the number of tickets actually sold the testimony is very uncertain. Without going into a detail of the evidence, which is very lengthy, there is no proof whatever that any more than about 400 tickets were sold, putting the most favorable construction for the plaintiff upon the evidence. As to about three fourths of that number great doubt arises whether the tickets were actually sold, or were merely placed with certain parties to be sold. There was proof that 2000 tickets were printed for use in Galveston and placed with agents for sale; but depositing them for sale and selling them are quite different things.

When we pass to a consideration of the number that might have been sold, we find the evidence wrapped in still greater uncertainty. It is sought to establish the probable amount of these by showing that the occasion drew a great many visitors to Dallas; that some of the trains going there were full of passengers, and that the base-ball match and races were much talked about in Galveston, and the opinion of witnesses was given that on account of the low price of the excursion tickets a great many more persons would have gone than at the usual rates. Other evidence of a similar character was given on the subject.

It is too clear for argument that no reliable data are furnished by this kind of evidence upon which any calculation as to the probable amount of tickets that the appellee would have sold can be based. No one upon a careful review of it can say whether it shows more satisfactorily that 700 or 5000, or any intermediate number could have been sold. It is true when such a matter is not susceptible of exact proof we must resort to what approaches nearest to certainty. But, especially in cases of contract, must we base our calculations upon facts drawn from experience or observation in cases of a similar nature. For instance, if a man has been engaged in business for any length of time he can form some estimate from his past earnings what its profits will be in the future. In such cases, if deprived of the faculty of pursuing the business at least by the tortions of another, it has been held that he can es-

timate his damages with something like certainty. *Penn. R. R. Co. v. Dale*, 72 Penn. St. 47.

If one plants seed and gathers a crop from it he knows how much his land would probably produce during that season. Hence, if the seed were of a different species of a particular class from what they were represented or warranted to be, he can figure up his loss by deducting the value of the crop raised from the value of a like crop of the desired article. *Wolcott, Johnson & Co. v. Mount*, 7 Vroom, 602.

There was no proof as to the number of people transported upon any similar excursions. None as to the number of people from Galveston and other points on the route that did visit Dallas upon this occasion. No proof as to how many attended from any given point. There was no evidence as to how many applications for tickets were made or how many had declared their intention of going to Dallas, or anything of the kind. Our courts have not gone so far as some others in allowing uncertain profits as a measure of damages. We have not allowed the value of lumber that a mill could have sawed (*Stark v. Alford*, 49 Tex. 260), nor the amount of crop one could have raised when his crop has been destroyed by the breach of contract or even tortious act of another. *Jones v. George*, 50 Tex. 149; s. c., 61 Tex. 345; *R. R. Co. v. Joachimi*, 1 *Texas Law Review*, 84; *R. R. Co. v. Young*, 2 *Texas Law Review*, 313. Yet, the amount of lumber that a mill could saw, or of crop that land would produce, might possibly be proximated from the past experience of many years. It would at any rate be in a great degree more certain than any calculation as to the number of passengers who would embark upon any excursion, which must be in a great measure matter of conjecture, as the like seems never to have occurred before.

Taking the evidence as we find it in the record, containing as it does no reliable proof outside the amount of tickets actually sold or bargained for, as to how many could have been sold for the occasion, whether 100, 500, 1000, or any other number, the limit of damages to which the plaintiff was entitled were the net profits on tickets actually sold or bargained for, less the probable expenses of the excursion. To these might also be added the amount paid as passage money for persons whom Hill had agreed to transport to Dallas and back, did actually transport, and what it would have cost him to have them carried had the contract been fulfilled.

DAMAGES FOR  
BREACH OF EX-  
CURSION - TICKET  
CONTRACT.

The charge of the court was doubtless intended to be in accordance with this view of the measure of damages. It was not, however, sufficiently restrictive as to the facts in evidence which the jury could take into consideration in arriving at the amount of damages to be recovered. The jury were by the evidence and charge launched upon a sea of speculation without rudder or com-

pass to guide them, and it is not matter of surprise that they found an amount double that which the plaintiff himself, by the entry of his remittitur, in effect admitted he was entitled to recover. If it could be clearly ascertained from the evidence that under the foregoing rule as to damages the plaintiff was entitled to recover the sum to which the verdict was reduced by the remittitur, the judgment might possibly stand. But, under the most favorable view for the plaintiff, he did not establish his right to one third of that sum, and we cannot even tell whether the amount recovered was for tickets actually sold or engaged, or was conjectured from what the witness said as to the probabilities of a large excursion to Dallas. We think the judgment not warranted by evidence under the law of the case, and it will be reversed and the cause remanded for a new trial.

Reversed and remanded.

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MURDOCK

v.

BOSTON AND ALBANY R. R. Co.

(137 *Massachusetts Reports*, 293.)

If the ticket seller of a railroad corporation delivers to a passenger a ticket with a hole punched in it, and assures him that the ticket entitles him to be carried to his place of destination, when, in fact, by the rules of the corporation, it does not, and the passenger is expelled by the conductor from the train of cars for refusing to pay additional fare, he may maintain an action therefor against the corporation.

TORT for being expelled from a train on the defendant's railroad at Pittsfield, and for false imprisonment in the lock-up of that town. See same case, 6 Am. & Eng. R. R. Cas. 406. Trial in the superior court, before Bacon, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff testified that he went to the ticket office of the defendant, at Springfield, in the evening of May 27, 1880, and asked the ticket seller for a ticket to North Adams, which is a station on the Pittsfield and North Adams R. R., which road was run and managed by the defendant under a lease. The ticket seller, on being paid the fare to that station, handed to him a ticket from Springfield to Chester, and a ticket from Springfield to North Adams, which last ticket had been punched twice. The plaintiff, seeing only the printed matter on the ticket from Springfield to Chester, repeated his request for a ticket from Springfield to North Adams. The ticket seller then explained to him that he sold that

ticket from Springfield to North Adams that morning to a man who came to the office in the afternoon and said that he had used the ticket only to Chester, and asked him to take it and repay the price of it less the fare to Chester, which he had done, and that the punches in it indicated that it had been so used, and that, with the ticket from Springfield to Chester, it would be good to the plaintiff for a passage from Springfield to North Adams. Thereupon the plaintiff, saying that all he wanted was a good ticket to North Adams, took the two tickets, believing them to be good for that trip. In a few moments he took the train which left Springfield at twenty minutes before ten o'clock. Soon after it started, he presented the tickets to the conductor of the train, who accepted the ticket from Springfield to Chester as good for a passage to Chester, but told the plaintiff that the punched ticket was not good for a passage between Chester and Pittsfield, because the two punches showed that it had been used between Chester and Pittsfield, as well as between Springfield and Chester, and that he must pay the fare (seventy cents) from Chester to Pittsfield. The plaintiff told the conductor that he had paid the ticket seller at Springfield the fare from Springfield to North Adams, and had received the two tickets on the assurance of the ticket seller that they were good for a passage between those points, and declared that he would not pay any fare, and asked the conductor to telegraph to the ticket seller and ascertain the facts. The conductor refused to telegraph, and told the plaintiff that, if, he would not pay the fare from Chester to Pittsfield, he must leave the train at Chester, because his ticket was not good between Chester and Pittsfield. After the train left Chester, the conductor demanded of him the fare, and the plaintiff refused to pay it, and, when the train reached Pittsfield, the conductor took hold of his collar, and, after he had alighted from the train, asked him to pay the fare, which he refused to do, whereupon the conductor gave him in charge of a police officer of Pittsfield as one refusing to pay fare, to be locked up, and the conductor then went on with his train towards Albany. The plaintiff went with the police officer to the lockup, and on the way was asked by the police officer pay his fare and be released, which he refused to do. He was kept in the lockup until morning, when he was taken to the police court and was discharged by the judge, who told him that no complaint would be made against him. It was admitted by the plaintiff that he was confined in a proper and suitable place during the night, and was properly treated while there; and it was admitted by both parties that the conductor was one of the railroad police.

This was, in substance, the whole evidence introduced by the plaintiff, except what related to the amount of injury to health sustained by him by reason of the arrest, the charge made against him, and the imprisonment.

The ticket seller testified for the defendant, in substantial cor-

roboration of the testimony of plaintiff as to what took place at the time of the purchase of the tickets; that he sold the tickets, supposing that the punched ticket had been used only to Chester, though he knew nothing about that except what the man from whom he redeemed it told him; that he now knew that the rules of the railroad required a ticket to be punched once between Springfield and Chester, and once between Chester and Pittsfield, but that he did not know of this rule when he sold the tickets. On cross-examination, he testified that he had been a ticket seller for the defendant twenty-seven years; that he had sold punched tickets before; that, in one instance, about three months before this affair, he had sold a ticket with two punches under precisely the same circumstances under which he sold the tickets to the plaintiff, and he heard nothing about it afterwards; and that he was discharged by the defendant from its service because of the selling of the punched ticket to the plaintiff.

The general superintendent of the defendant's road testified to the printed rule of the defendant relating to the punching of tickets on trains, which was in force when the acts complained of were done, and had been for ten years before, and was in the hands of conductors for their guidance. The rule, which was put in evidence, was in the following words:

"All tickets must be cancelled by the punch when first presented, and, if left in the hands of the passengers, must be punched as often as once in twenty-five miles, or as they pass over the following divisions, viz.: between Boston and South Framingham, South Framingham and Worcester, Worcester and West Brookfield, West Brookfield and Springfield, Springfield and Chester, Chester and Pittsfield, Pittsfield and Chatham, Chatham and Albany. Tickets must not be cancelled for two divisions at the same time."

The superintendent further testified that a ticket from Springfield to North Adams punched twice showed that it had been used to Pittsfield, and was no longer good between Springfield and Pittsfield, or Chester and Pittsfield. He also testified that printed instructions to employees of the defendant acting as railroad police were given to all conductors of passenger trains on the defendant's road, the only one material to this case being as follows: "Section 7. No railroad corporation shall eject any person from its cars for non-payment of fare, excepting at some passenger station upon its road. Officers of the railroad police may arrest any passenger refusing to pay his fare, and may deliver him into custody at any regular passenger station."

The conductor testified that the rule about cancelling tickets was given to him when he began work as a conductor, in October, before the affair with plaintiff; that he had it in his pocket then, and that the rule had not been modified in any way; that he then knew of the instructions to railroad police testified to by the general

superintendent; that he told the plaintiff that his ticket was not good between Chester and Pittsfield, because the punches showed that it had been used between those stations; that he borrowed of a passenger his ticket and showed it to the plaintiff, and explained to him that one punch indicated that the ticket had been used to Chester, and the two punches showed that it had been used to Pittsfield; that he had three conversations with the plaintiff about the matter, and told him, before he arrived at Chester, that he must leave the train at Chester, unless he paid the fare from Chester to Pittsfield; that, after leaving Chester, he demanded fare of the plaintiff, which was seventy cents, and offered to give him a receipt for it showing the circumstances under which it was paid, so that he could get it back, if it was found that his account of the purchase of the ticket was true; that when the plaintiff asked him to telegraph to the ticket seller he declined, saying that the ticket seller would not be at the office and that a telegram would not reach him that night; that his reason for saying this was that the telegraph operator had told him that there was no messenger at the office after his train left, and that no messages would be delivered at night, if sent from his train, unless they were addressed to the superintendent or some official, and related to an accident; that he did not touch the plaintiff, and, after the plaintiff had alighted from the train, he again asked him to pay the fare; that the plaintiff refused, and he gave the plaintiff into custody, as the plaintiff testified; that he went on to Albany with his train, leaving Pittsfield a little before midnight, and reached Pittsfield on the return train at about four o'clock the next morning, where he left the train to proceed east, while he stopped at Pittsfield; that he took such steps that, at about half-past eight o'clock in the morning, he received a telegram from the ticket seller, saying that the tickets were sold under the circumstances stated by the plaintiff, and asked him that the plaintiff be released from custody; and that he, being obliged to take a train for Springfield then about to start, asked the defendant's station agent to attend to the matter.

A. W. Kellogg testified that, at the request of the station agent, he went to the police-court and informed the judge in open court that the plaintiff had been arrested for not paying fare on the defendant's road; that it had that morning been discovered that there had been a mistake about the ticket given to the plaintiff, and that there would be no complaint; that thereupon the judge informed the plaintiff that there would be no complaint against him, and he was discharged; that the plaintiff said he wished for a complaint; and that the judge told him there would be none.

The foregoing was, in substance, all the evidence in the case, except what related to an apology by the ticket-seller to the plaintiff, and endeavors on his part and on the part of the defendant to

make a settlement with him, and what related to injury to the plaintiff's health, as above stated.

At the close of the evidence, the defendant asked the judge to rule as follows: "1. On the whole evidence, the verdict must be for the defendant. 2. On the undisputed evidence, the ticket sold to the plaintiff was not by the rules and practice of the defendant good for a passage between Chester and Pittsfield. 3. The conductor had the duty, under the rules of the defendant, to demand and collect fare of the plaintiff for the passage from Chester to Pittsfield, and the right, on his refusal to pay that fare, to eject him from the train. 4. The conductor had the right to turn the plaintiff, when off the train at Pittsfield, over to the police at that station for custody. 5. Inasmuch as the ticket which the plaintiff offered to the conductor was not good for a passage from Chester to Pittsfield, it was the duty of the plaintiff, on demand of the conductor, to pay the fare from Chester to Pittsfield, and, on his refusal to do so, he had no right to remain on the train, and was liable to be expelled from it at a station. 6. It was no part of the duty of the conductor to take the word of the plaintiff as to what he paid for the ticket which he offered, or as to what ticket he asked for, or as to what took place between him and the ticket-seller; and the conductor was entitled to expel the plaintiff from the train at Pittsfield, unless he paid the fare from Chester to Pittsfield, the ticket not being good for that passage. 7. And the conductor had the further right to turn the plaintiff over to the police for custody until morning. 8. The manner of the discharge of the plaintiff by the judge of the court at Pittsfield, without a sworn complaint having been made, did not affect the rights of the defendant, nor make the arrest or imprisonment of the plaintiff illegal."

The judge refused to give the rulings asked for, except the second and eighth, modified as hereinafter stated; and instructed the jury that, whether the ticket was good or not beyond Chester, if the jury found that the plaintiff exercised that care which a prudent and reasonable person would exercise in the procuring of his ticket, and the paying of his fare from Springfield to North Adams, and was furnished by an agent of the corporation with this ticket, and, in the exercise of due and reasonable care, such as a prudent person would take, took it, he was entitled to go upon that train, and to ride all the way from Springfield to North Adams without any interruption on the part of any officer of the corporation; that it was an offence against the law for a man fraudulently to attempt to evade his fare; that the jury ought not to give him any damages for any injury which the plaintiff received from the police-officers in Pittsfield, where they went beyond their line of duty in the matter of holding him for trial the next day in court; that the manner of the discharge of the plaintiff by the judge of



the court at Pittsfield, without a sworn complaint having been made, did not affect the rights of the defendant, nor make the arrest or imprisonment of the plaintiff illegal.

The jury returned a verdict for the plaintiff in the sum of \$4500; and the defendant alleged exceptions.

*A. L. Soule* for the defendant.

*R. M. Morse, Jr.*, and *H. L. Harding*, for the plaintiff.

**C. ALLEN, J.**—It appears that the defendant's agent and ticket-seller told the plaintiff that the two tickets would be FACTS. good for a passage from Springfield to North Adams, and explained the meaning of the punched holes, and, with a full understanding of exactly what the tickets were and of what the plaintiff wanted, sold them to him as tickets good for his contemplated trip. There was nothing on their face to show the contrary to the plaintiff, and he took and paid for them on the strength of these explanations and assurances of the ticket-seller. There was no mistake on the part of either as to where the plaintiff wished to go, or what terms were actually expressed upon the tickets, or what marks or punched holes they bore. The circumstances of there being two tickets, and of the holes in one of them, naturally induced inquiry by the plaintiff, and he had no reason to distrust the correctness of the explanations which were given to him. The ticket-seller assumed to know, and gave assurances which the plaintiff had a right to rely on, and which he did rely on. If, when the conductor refused to accept the punched ticket, it had appeared on an inspection of it that there had been a mistake, and that it did not on its face purport to be good for a passage over that part of the defendant's road, and that the ticket-seller had delivered to the plaintiff a good ticket upon some other railroad, or to some place which had already been passed, when the mistake was discovered, and it was found that the plaintiff had through inadvertence accepted a ticket which on its face was plainly insufficient, then this case would have fallen within the doctrine of the recent decision in *Bradshaw v. South Boston R. R.*, 135 Mass. 407; s. c., 16 Am. & Eng. R. R. Cas. 384, and it would have been the duty of the plaintiff to yield for the time being, and pay his fare anew, or withdraw from the car, unless a distinction should be taken between the rights of passengers upon steam railways and street railways, under such circumstances,—a question which we do not now consider. See *Cheney v. Boston & Maine R. R.*, 11 Met. 121; *Yorton v. Milwaukee, Lake Shore & Western R. R.*, 54 Wis. 234; s. c., 6 Am. & Eng. R. R. Cas. 622; *Townsend v. New York Central & Hudson River R. R.*, 56 N. Y. 295; *Petrie v. Pennsylvania R. R.*, 13 Vroom, 449; *Dietrich v. Pennsylvania R. R.*, 71 Penn. St. 432; *Frederick v. Marquette, Houghton &*

ACCEPTANCE OF  
INSUFFICIENT  
TICKET. PAY-  
MENT OF FARE  
NECESSARY;

Ontonagon R. R., 37 Mich. 342; McClure v. Philadelphia, Wilmington & Baltimore R. R., 34 Md. 532.

But, in the present case, such is not the position of the parties. BUT NOT WHERE DEFECT IN TICKET IS LATENT: As has been seen, the plaintiff not only was not guilty of any negligence in accepting his ticket, but he examined it carefully, saw everything there was on it, and received explanations of the meaning of the punched holes, and assurances that the two tickets, in the condition in which they were, would be good for the trip. In such a case, there being no mistake or inadvertence on his part in the respects mentioned, and the tickets which were delivered being in all particulars such as were intended to be delivered, and there being nothing which could be gathered by inspection to show that they were insufficient, and no notice of their insufficiency being given to the plaintiff by anybody, or in any form, until he had already entered upon and partially accomplished his journey over the defendant's road, he might well insist upon being allowed to complete that journey. If the defendant's superintendent or president, or both of them, had been standing by when the plaintiff purchased his tickets, and had heard and assented to what was said by the ticket-seller, and if they also were under the same mistake as to the rules established for the guidance of conductors, the legal position of the plaintiff would hardly have been stronger than it is at present. It would still be the case that he took his tickets relying on the mistaken assurances of the defendant's agent in respect to their validity. If the defendant, through any imperfection in its rules or methods, or any ignorance or violation of rules or instructions by its agents, has been led into any interference with the rights of the plaintiff under such circumstances, it must abide the consequences. To hold the contrary would be a burden upon passengers such as is called for by no reason of necessity or expediency.

On the other hand, it is no more than a wholesome requirement that railway companies should be responsible in damages for the consequences of a mishap such as occurred in the present case. The conductor's explanation of the meaning of the two punched holes might or might not be correct; at any rate, their meaning was purely arbitrary, and, so far as the plaintiff could see, the conductor's interpretation was no more probable or intelligible than that given by the ticket-seller. The plaintiff had a right to act upon the explanations given to him at the time when he bought his ticket. The mistake was that of the ticket-seller, in supposing that the punched holes signified that the ticket had been used only to Chester, whereas, in fact, according to the defendant's rules for the instruction and guidance of conductors, they signified that it had been used to Pittsfield, a station farther on. The offer of the conductor to give a receipt to the plaintiff for the additional fare which he demanded, stating the circumstances under which it

was paid, so that the plaintiff might get back the money, if it should be found that his account of the purchase of the ticket was true, though showing good faith on the part of the conductor, did not have the effect to make it the legal duty of the plaintiff to pay the additional fare.

EVEN THOUGH  
CONDUCTOR OFFERS  
TO GIVE RECEIPT FOR FARE.

It follows that all the instructions requested were properly refused, except as modified by the presiding judge; and the instructions which were given were clearly and accurately expressed. *Maroney v. Old Colony & Newport R. R.*, 106 Mass. 153.

Exceptions overruled.

**Expulsion of a Passenger for a Defect in his Ticket not Discoverable by him by Inspection.**—The right of a person to ride in a railway car is, of course, conditional upon his complying with the reasonable regulations of the railroad company as to the payment for his carriage, as to his conduct and deportment in the car, etc. The company may reasonably require that every passenger shall, when called upon, present a ticket conforming to the reasonable regulations and requirements of the company, or, if unable so to do, pay a fare, and if a passenger is unable to produce the required ticket and refuses to pay his fare, he may be lawfully ejected from the train, even though the passenger may have bought a valid ticket which he has lost. *Downs v. New York and New Haven R. R. Co.*, 36 Conn. 287; *Duke v. Great Western R. R. Co.*, 14 U. C. Q. B. 377; and even though he may have been furnished with a wrong or insufficient ticket through the negligence of a servant of the railroad. *Frederick v. Marquette, etc., R. R. Co.*, 37 Mich. 349; *Chicago, etc., R. R. v. Griffin*, 68 Ill. 499. The opinion of the court in the former of the two cases last cited explains the reason of the rule in a most satisfactory manner. "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him. Practically there are but two ways—one, the evidence afforded to him by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind, and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statutes the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and cannot be procured. Yet here would be an investigation as to the terms of the contract where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purposes of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the travelling public generally. As between conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case." [Action was trespass on the case for damages for unlawful expulsion.]

Does any different rule apply when the ticket presented is defective in not complying in certain respects with the reasonable regulations of the company,

but the defects are not such as the passenger could have discovered on inspection of the ticket? It is believed that this precise point was never directly involved in any reported case except the principal case. There is, however, a dictum in *Hubbard v. Grand Rapids, etc., R. R. Co.*, 18 Am. & Eng. R. R. Cas. 386, in accord with the decision in the principal case. The court say: "If the conductor, who was manager of the train, informed him that for any reason the ticket was one he could not receive, a contest with him over it must generally be very profitless, and therefore unadvisable; but we are all of opinion that if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car."

In the case of *Pennsylvania R. R. Co. v. Connell*, 18 Am. & Eng. R. R. Cas. 389, the ticket was a coupon ticket perfectly good on its face, and the question as to its validity depended on the authority, or apparent authority, of the road selling the ticket to sell a coupon ticket over defendant's road. The railroad company had instructed its conductors not to receive coupons such as the plaintiff presented, and the plaintiff refusing to pay fare was ejected from the train by the conductor, and brought his action for such ejection. The court (Supreme Court of Illinois) say: "If it be true that appellee, by virtue of his ticket, was entitled to be carried over appellant's road, the question presented is whether he can recover damages for being forcibly expelled from the train, or was it his duty, when notified by the conductor that he would not receive the ticket, to pay his fare under protest, or leave the train and hold the company responsible for the expulsion, without compelling the conductor to resort to force. Had appellee paid the fare demanded, he might have sued the company and recovered for a breach of the contract; had he left the train when the conductor refused to receive the ticket and ordered him to leave, he might have sued and recovered for all damages sustained in consequence of the act of the conductor expelling him from the train. But can he recover for the force used by the conductor which he, by his own act, induced the conductor to resort to in order to put him off the train?" The court conclude that he cannot. This case seems to go the length of holding that a passenger, although conforming to all reasonable regulations of the road, must leave the train if ordered to do so by the conductor. If so, it seems at variance with the principle that any person is entitled to ride in the cars of a railroad, a common carrier, provided he conforms to the reasonable regulations of the road. If this right exists, it is difficult to see why a person having it should be obliged to relinquish it at the command or request of any one,—why he may not rest on his right to remain in the car and compel any one who means to interfere with it to use force.

As to the decision in the principal case, it is difficult to see why, if the ticket was not, as a matter of fact, good for a ride between Chester and Pittsfield, the conductor was not authorized to expel plaintiff, although there was nothing in the ticket itself which would indicate this defect to one not acquainted with the company's system of punching tickets. According to the principle of the *Michigan* case, the ticket is the only evidence of the contract which the conductor can take into consideration, and the punch-hole in the ticket was a part of the evidence, although plaintiff had no other means of ascertaining its meaning than to rely on there presentations of defendant's servants. A person taking a ticket with a hole punched in it should know that the punch-mark must have some meaning, and, even if he takes the trouble to make inquiries as to its meaning from the person selling it to him, he should know that in case his informant is mistaken and the ticket wrong the conductor can take no other course than to expel him from the train.

For a discussion of the subject of the right of a railway company to expel passengers for an irregularity in ticket, failure to produce ticket, etc., see note to *Pennsylvania R. R. Co. v. Connell*, 18 Am. & Eng. R. R. Cas. 845.

FRANK

v.

INGALLS.

(42 *Ohio State*, 560.)

When the possession of a railroad passenger ticket which entitles the holder to one first class passage between points named therein has been fraudulently obtained from the company, a person purchasing such ticket from the holder thereof, although for value and without notice of equities, acquires no title thereof.

An agent authorized to sell such tickets, and stamp and deliver the same upon receiving pay therefor, cannot bind his company by stamping and delivering such tickets without the knowledge or consent of its proper officers to a third person, to be sold by him, and to be paid for when sold.

**ERROR** to the district court of Hamilton County. At the time of the transaction out of which this controversy arose, M. E. Ingalls was the duly appointed and acting receiver of the Indianapolis, Cincinnati and Lafayette R. R. Co. Stephen Eagan was his local ticket agent in Cincinnati. He had sole charge and control of the passenger tickets issued for Ingalls' railroad, and sold at the local office in Cincinnati; but his authority was limited to sales for cash. Frank, the plaintiff in error, was a railroad ticket broker in Cincinnati, but did not know of the limitation put upon Eagan's authority.

Eagan and Frank had known and been acquainted with one Fordyce for nearly one year and a half prior to this time. Fordyce had frequently purchased railroad tickets from Eagan to sell upon the street and to ticket brokers, and had received such tickets from him properly marked with the stamp of his office, but with the understanding that he would return the tickets or bring the money for them. This Fordyce did, except in the case now under consideration. During the period of their acquaintance Frank purchased from Fordyce tickets issued by Eagan to the value of some two thousand dollars, which had always been honored by the officers of the railroad. Mr. Ingalls never knew of, nor assented to, these transactions between Eagan and Fordyce.

On the 14th of February, 1879, Fordyce went to the ticket office and stated to Eagan that he had a customer for four railroad passenger tickets to Pueblo, Colorado, at the same time showing a postal card purporting to be signed by one Bishop, and in which he ordered from Fordyce four tickets to Pueblo. Four tickets, of the value of \$45.50 each, were delivered by Eagan to Fordyce, properly stamped and ready for use, upon condition that they should be returned in the evening if not sold, or the money

therefor (\$182) if sold. The tickets contained these words: "This ticket entitles the holder to one first class passage to Pueblo, Colorado."

On the same day Fordyce sold these tickets to Frank for the sum of \$160. Frank purchased the tickets in good faith, and without knowledge of the circumstances under which they were held by Fordyce. Fordyce disappeared without paying the money to Eagan or to any one representing the receiver. The next day Ingalls, the receiver, commenced an action against Frank, and replevied the tickets from him. The court of common pleas found the ownership of the tickets in Frank, and rendered judgment accordingly. The district court reversed this judgment.

*Alfred Yapple* for plaintiff in error.

*Hoadly, Johnson & Colston* for defendant in error.

NASH, J.—The plaintiff in error seeks to have the judgment of the district court reversed on the theory that a railroad passenger ticket, like those described in the statement of facts, is negotiable and passes by delivery from the holder to a purchaser, and that any person purchasing and receiving such ticket from any holder thereof takes it freed of all equities of the railroad company, or defects of title, or want of authority in the seller to dispose of it.

The character of a railroad passenger ticket has been considered by the supreme court of this State. In the case of *C. C. & C. R. R. Co. v. Bartram*, 11 Ohio St. 457, it is spoken of as "a convenient symbol to represent the fact that the bearer has paid to the company the agreed price for his conveyance upon the road to the place therein designated." Again, in the case of *Railroad Company v. Campbell*, 36 Ohio St. 647, it is said that a railroad ticket "is simply a voucher that the person in whose possession it is has paid his fare." Lawson, in his work on "Contracts of Carriers," § 106, p. 116, says "that a railroad or steamboat ticket is nothing more than a mere voucher that the party to whom it is given, and in whose possession it is, has paid his fare and is entitled to be carried a certain distance," and supports his definition by the citation of numerous decisions.

It thus seems to be well established that a railroad ticket is a receipt or voucher. It has more the character of personal property than that of a negotiable instrument.

When the possession of such a ticket has been obtained by fraud the company has parted with the possession of it, but not with the title to it, and the person purchasing from the holder, although for value and without notice of equities, takes no better title than the party who fraudulently obtained possession of it. We do not perceive that the holder of such a ticket is in any better position than the *bona fide* purchaser of goods from one in possession, for a val-

TICKET NOT NEGOTIABLE SO AS TO CUT OFF AN-  
PRECEDENT EQUITIES.

TICKET A MERE  
VOUCHER.

nable consideration, and without notice of any defect in his vendor's title. Such a purchaser cannot be protected against the title of the true owner in a case where the vendor had fraudulently obtained his possession and without the knowledge or consent of the owner, although previous to such possession he had, by false and fraudulent representations, induced the owner to enter into a contract for the sale of the goods. *Dean v. Yates*, 22 Ohio St. 388; *Hamet v. Detcher*, 37 Ohio St. 356.

From the facts found by the court below, it appears that the possession of the tickets in controversy were obtained from Ingalls, receiver of the railroad company, by the fraud of Fordyce, and we conclude that Frank, the purchaser from Fordyce, obtained no title thereto.

Eagan, the agent of the receiver, authorized to sell such tickets, and stamp and deliver the same upon receiving pay therefor, did not bind his principal when he stamped and delivered the tickets, without his knowledge or consent, to a third person, to be sold by him, and to be paid for when sold.

Judgment affirmed.

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### LITTLE ROCK AND FORT SMITH R. R. Co.

v.

DEAN.

(48 *Arkansas Reports*, 529.)

A passenger on a limited railroad ticket is bound to use it within the time specified in the ticket, and to observe the reasonable regulations of the carrier for the running of trains and for facilitating the business of the carriage of passengers; and the company is bound to afford him the opportunity to do so, by running its trains within the time; and if in this it fail, though the last day be a Sunday, it cannot refuse the ticket afterwards, at least when offered on the first train after the expiration of the time.

A purchaser of a limited ticket over several connecting lines of railroads is not bound to make a continuous journey over all, but is bound to make it continuous over each coupon of the ticket; and over the last within the time limited.

A limited railroad ticket over several connecting lines expired on Sunday; the last line ran no train on that day, and the passenger offered the ticket on the train the next day. It was refused, and the passenger, under protest, and under threat of ejection by the conductor, paid his fare to a further station, and there, for want of money, was put off, and walked to his destination. *Held*, that the extra fare paid, the humiliation of being put off the train, and the inconvenience of reaching his destination by walking were proper elements of damage to be considered by the jury.

APPEAL from Pope Circuit Court.

J. M. Moore for appellant.

H. S. Carter for appellee.

**COCKRILL, C. J.**—The appellee purchased a ticket from Middleton, Tennessee, from the agent of the Memphis and Charleston R. R. via said railway, the Memphis and Little Rock R. R., and the appellant's railway to Russellville, Arkansas, on the first day of September, 1882. The ticket was limited on its face to the third of September. According to the regulations of the several roads as to the time of running trains, appellee should have reached Little Rock at 1 A.M. on the second of September, and in time to take the morning train on appellant's road; but although he arrived on that day at Argenta, no train went out after his arrival until the morning of the fourth of September. The third day of the month was Sunday, and no trains were run on the appellant's road on that day. The appellee, not being provided with the means to pay the expense of the delay, walked to the house of a friend about ten miles out on his route, and on Monday morning boarded the first train going in the direction of his destination since his arrival at Argenta. The conductor refused to honor his ticket because the time limited had run out, and informed him that he must pay his fare or leave the train. Appellee protested, and told him that he did not have the money to pay his fare, but finally gave the conductor all he had except ten cents, and a dollar that he borrowed for that purpose, and paid his fare to Pott's Station, which was short of his destination. On arrival at this station the conductor compelled him to leave the train, as he declined to pay any additional fare. Appellee, being without money, was forced to walk from that point to his destination. He sued the railroad for ejecting him from the train, and had a verdict and judgment for two hundred dollars.

It is urged here that this judgment should be reversed because the conductor did nothing more than his duty, or if he did, the damages awarded appellee are excessive.

It seems at first to have been doubted whether it was competent for a passenger carrier to enter into a contract limiting the time within which the holder of a ticket should avail himself of the right to use it, but the doubt has been definitely solved in favor of the contract. A passenger riding on a ticket limited as to the time within which it may be used is bound by the terms of the contract he has made in that regard, and he cannot wait until the ticket has expired by its own limitation, and still be entitled to ride by virtue of it. He is bound, too, to observe the reasonable regulations made for the running of trains and for facilitating the business of the carriage of passengers. The obligation bears upon the carrier with equal force. He must afford the purchaser of such a ticket the necessary facilities for accomplishing his journey within the stipulated time, and upon his failure to do so he is not in position to treat the contract of carriage as forfeited, and demand a repayment of

**RAILROADS: LIMITED TICKETS: OBLIGATIONS OF CARRIER AND PURCHASER.**



fare for the same passage, at least if the ticket-holder avail himself, as in this instance, of the first opportunity to complete his journey after the expiration of the time limited. *Auerbach v. N.Y. Cent. R. R. Co.*, 6 Am. & Eng. R. R. Cas. 334; *Stone v. C. & N. R. R.*, 47 Iowa, 82.

A party who has himself caused delay cannot inflict a forfeiture on another consequent on the latter failing to come up to time.

When the appellee bought his ticket he was informed that it could be used on appellant's road on the third day of September. This, in fact, is embraced in the terms of the contract itself, for it specified that the ticket could be used on the first, second, and third days of the month, and the last coupon was for use on appellant's road. The carrier selling the ticket was the agent of the appellant for that purpose, and the coupon attached for appellant's road was a contract by appellant as binding as if issued by its agent here. This is not disputed, but it is urged that the appellee should have presented himself to be carried on the train leaving Argenta on the morning of the second day. Appellee's contract did not require him so to do. The ticket named the third day and not the second as the limit. The holder of the ticket was not required to make a continuous trip from the starting-point to the place of destination. All that could be demanded of him was that he should make a continuous trip under each coupon within the time limited. That is, when he started on his journey over any one of the connecting lines, he was bound to continue without stop to the point on that line named in his coupon. *Hutchinson on Car.*, sec. 578; *Auerbach v. N. Y. Cent. R. R.*, 89 N. Y., s. c., 6 Am. & Eng. R. R. Cas. 334.

The appellee appears, however, to have made all the expedition in his power. He left Middleton on Friday, arrived at Memphis the same day, at Argenta the next, and boarded the first train leaving that place on appellant's road after his arrival.

Appellant admits that no trains were run over its roads on a Sunday, and that appellee had no opportunity to use his ticket on the third day of the month in question on that account. It may be that appellant was under no obligation to run its trains for the accommodation of the public on that day. No breach of duty in that regard is complained of in this case. The appellant elected to treat Sunday as no day, and declined to execute its contract, the performance of which fell on that day, for that reason. Under these circumstances, we can see no reason why the rule applicable to other contracts should not be enforced as to this, viz.: if a contract matures on Sunday the performance is to be exacted on the next day. 2 Whart. Cont. sec. 897; *Clock v. Bunn*, 6 Johns. 326; *Perkins v. Dibble*, 10 Ohio, 433; *Link v. Clemmens*, 7 Blackf. (Ind.) 479.

This rule is the more applicable to the case at bar for the reason

that the time for the performance is imposed by the railroad by way of limitation, and the contract should be so construed as to save the right and prevent a forfeiture if it can be done. *Barnes v. Eddy*, 12 R. I. 25; *Evans v. St. L., I. M. & S. R. R.*, 11 Mo. App. 463; *Auerbach v. N. Y. Cent. R. R.*, 89 N. Y. 281; s. c., 6 Am. & Eng. R. R. Cas. 334.

The regulation of the company requiring the conductor to refuse such tickets after the last day of its limit could not affect appellee's legal rights. *Burnham v. R. R.*, 63 Me. 298; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116.

The conductor doubtless thought he was performing his duty, but that does not help the appellant's case.

No harsh or unnecessary means appear to have been resorted to in this instance to expel the appellee from the train, though he himself testified that the conductor threatened to throw him off. The elements of damage the jury were directed to consider in case they found for appellee were the extra fare paid by him, the humiliation of being put off the train, and the inconvenience of being compelled to reach his destination by other means. The jury might well consider all of this, and we cannot say that the amount awarded is excessive. *Sutherland on Dam.*, pp. 250 *et seq.* 270; *Walsh v. R. R.*, 42 Wis. 23; *Jeffersonville R. R. v. Rogers*, 38 Ind. 116; *Pittsburg, Cin. & St. L. R. R. v. Humeigh*, 39 Id. 509.

Affirmed.

**Coupon Tickets.—Right to stop over at Terminals of Connecting Lines.**—In general a ticket, even though not expressly limited, is good only for a continuous passage to the place of destination. The contract implied from the sale of the ticket is an entire one for a continuous carriage. 2 Wood Ry. Law, 1897; *Drew v. Central Pacific R. R. Co.*, 51 Cal. 425; *Hill v. Syracuse, etc., R. R. Co.*, 68 N. Y. 101.

Where, however, a coupon ticket is sold for a carriage over several connecting lines, each coupon is regarded as a separate contract for carriage on the part of the road over whose line such coupon is good, and hence it follows that in the case of such a coupon ticket the bearer may stop over at terminal points between the connecting lines. *Auerbach v. New York Central, etc., R. R. Co.*, 6 Am. & Eng. R. R. Cas. 334; s. c., 89 N. Y. 281; *Brooke v. Grand Trunk R. R. Co.*, 15 Mich. 832; *Hutch. Carriers*, § 578. But the bearer has no right to stop over at stations between such terminal points. *Auerbach v. New York Central, etc., R. R. Co.*, *supra*.

**Same, Express Provision that Passage shall be Continuous to the Point of Destination.**—It seems that an express provision in the ticket or in the contract for carriage that the passage must be continuous to the point of destination would be binding on the passenger, and would take away his right to stop over at terminal points. *Hutch. Carriers*, § 578.

But provisions on this subject must be clear, and where they are of doubtful import they will be construed against the company, and the passenger will be held to have the right to stop over at terminal points. *Auerbach v. New York Central, etc., R. R.*, 6 Am. & Eng. R. R. Cas. 334; s. c., 89 N. Y. 281. In this case the passenger bought a ticket for passage from St. Louis over the several roads mentioned in coupons annexed to the ticket to the

city of New York. It was specified on the ticket that it was "good" for one continuous passage to point "named in coupon attached." The court say: "The language printed upon the ticket must be regarded as the language of defendant, and if it is of doubtful import, the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, such intention should have been plainly expressed and not left in doubt, as might, and naturally would, mislead the passenger.

For a general discussion of the law relating to continuous tickets and lay-over checks, see note to *Auerbach v. New York Central, etc.*, R. R. Co., 6 Am. & Eng. R. R. Cas. 337.

Limitation as to the Time within which a Ticket must be used—Limitations in Ticket as to Time must be Reasonable.—"In all cases the conditions (on the use of tickets) must be reasonable, or they will have no validity, and if they are impossible of performance they are unreasonable. Thus, if a ticket is issued from A to B and return, 'good for this day only,' and there is no train which leaves B on the return trip to A after the arrival of the train, the condition would be unreasonable, and the holder would be entitled to a return passage to A on the first train leaving B for A on the next day." 2 Wood, Ry. Law, 1408.

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### MOSHER

v.

### ST. LOUIS, IRON MOUNTAIN AND TEXAS R. R. Co.

(*Advance Case, U. S. Circuit Court, E. D. Missouri. March 20, 1885.*)

A limited railroad ticket provided, in express terms, subscribed to by the purchaser, that before being used for the return trip the purchaser should present himself for identification and have his ticket stamped at the office of the authorized agent of the company at the place of his destination. The purchaser so presented himself, but the agent being absent and not appearing before the train which he desired to take started, he proceeded on his return trip without having his ticket stamped, and presenting it to the conductor with an explanation of his non-compliance with the condition named therein. The conductor declined to accept the ticket, and, being refused the usual fare, he expelled the passenger from the train. *Held*, that he had no cause of action against the railroad company, and *held*, that a conductor is not bound to enter upon a judicial investigation, as he is entitled to rest upon the faith of the ticket which is presented to him.

DEMURRER to amended petition.

The amended petition differs from the original in stating that the plaintiff presented himself and ticket at the business office of the defendant's "authorized agent" at Hot Springs, his original destination, "during business hours, and a reasonable time before the time of departure of its train for St. Louis that plaintiff desired to take and did take, and was ready and willing, and then and there offered, to identify himself as the original purchaser of said ticket," etc., but that there was no authorized agent there, and

that none appeared before the departure of the train which the plaintiff desired to and did take.

*E. P. Johnson and William M. Eccles* for plaintiff.

*Bennett Pike* for defendant.

**BREWER, J.**—The question in this case has been argued the third time in this court. I do not see that this amended petition changes the substantial facts in any respect. It still appears, as **FACTS** heretofore, that the plaintiff purchased a ticket called a round-trip ticket, from here to Hot Springs and return. That ticket contained an express contract, which in terms provided that it should be presented to the station agent at Hot Springs, and by him stamped upon the back, after being satisfied that the person presenting it was the person to whom the ticket was issued. It was a limited ticket with special rates. Upon that ticket the plaintiff went to Hot Springs, no objection being made. He was ready to return, but the agent not being present at the ticket office at Hot Springs, the ticket was not presented to him, the holder was not identified, nor the ticket stamped by him. With that ticket unstamped, without any identification, the plaintiff started to come back to St. Louis. He rode from Hot Springs to Malvern without objection, but from Malvern, coming this way, upon the Iron Mountain road, the conductor objected and refused to take that ticket. The plaintiff was removed from the train, and he brings this action to recover damages for the expulsion.

I dissent entirely from the construction placed upon the ticket by counsel at this time, and now for the first time. **INDORSEMENT STAMPED BY TICKET AGENT HELD ESSENTIAL.** Heretofore it was conceded that the ticket required upon its face an indorsement stamped by the station agent at Hot Springs. This time counsel seems to claim that it did not require anything of the kind. I think it did. The language is plain.

The authorities which have been cited by counsel do not come up to this case, for here, when the plaintiff took that ticket he entered into an express contract. It is not a question of implied contract, or of rights independent of a contract. The plaintiff took that ticket, signing it at the time he took it, thereby creating an express contract between him and the railroad company, by which the ticket was to be good for a return passage when, and only when, indorsed by the agent at Hot Springs, and when the owner and holder had been identified there to his satisfaction. **EXPULSION FROM TRAIN FOR FAILURE TO GET TICKET STAMPED HELD PROPER.** The conductor, when the ticket was presented, saw no stamp upon it. The plaintiff had not been identified, and the rules of the company, binding upon him as a conductor, required him to remove the party unless he paid his fare. Now, can it be that the railroad company is responsible because the conductor did that which, by the rules of the company,—

reasonable rules, too,—in pursuance of his duty, he ought to have done? Grant that there was an implied contract that the station agent should have been at the Hot Springs depot. If the plaintiff had sued for a breach of that contract, and had asked the amount which he was compelled to pay in order to purchase a return ticket, then a very different question would have arisen. But here he relies on the fact that the expulsion from the train was unlawful, because the conductor ought to have taken his statement instead of that evidence which was provided by the contract, viz., identification and the stamp of the agent at Hot Springs.

It certainly would introduce a very uncertain rule of procedure if a conductor could not rest upon the faith of the ticket which is presented to him,—if he is bound to act as a judicial tribunal, and take testimony and inquire into the excuses or reasons for the non-perfection of a ticket which is presented to him. The party took the ticket upon the face of which was the express stipulation that before it should be good for a return passage the holder should be identified by the agent at Hot Springs, and he should stamp that ticket on the back. Now the party says: "Why, I wanted to prove to the railroad conductor that I was the man—the party who took that ticket in the first instance." Can the courts cast upon the conductor the duty of entering upon a judicial investigation? Of course, the conductor could not at the instant secure counter-testimony, and he would be bound to take the statement of the party as to the facts of the case, independent of the express language of the ticket. I do not think that the conductor is bound to do anything of the kind. I think he has a right to rely upon the language of the contract as expressed in the ticket. If the party was injured by the negligence or wrong of somebody else, he should have paid his fare back, and then sued to recover the amount which he had been compelled to pay owing to the omission, negligence, or misconduct of the agent at Hot Springs.

As I said, this is the third time this question has been presented by demurrer, and while the petition has been changed from time to time, yet the substantial facts still remain to-day as they were in the first instance. The demurrer will be sustained.

The party, of course, will have his exceptions. Judgment will be found for the defendant, and as the *ad damnum* clause is over \$5000, he can take it to the Supreme Court of the United States, and there settle the question which by it has not yet been determined definitely. It has been determined one way and another by the courts of the different States, but the question whether a conductor is justified in acting on the letter of the ticket presented to him, or is bound to take the statement of the passenger as to matters concerning which the ticket makes express provision, and

TICKET IS THE  
ONLY EVIDENCE  
TO BE REGARDED  
BY CONDUCTOR  
AS TO PASSEN-  
GER'S RIGHTS.

whether, if he mistakes, the company is responsible, has not yet been settled by the Supreme Court of the United States, but can be settled in this case if the plaintiff desires.

The demurrer will be sustained, and judgment entered for the defendant.

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MAURITZ

v.

NEW YORK, LAKE ERIE AND WESTERN R. R. Co.

(*Advance Case, United States Circuit Court, E. D. Wisconsin. November 28, 1884.*)

The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice printed upon the face of the ticket issued by it stating the terms upon which baggage will be carried, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances of the transaction are such as to make the omission of the passenger to read the conditions on the ticket negligence *per se*.

Where the passenger is unable to read, and no explanation is made by the agent of the company selling the ticket, he is not bound by the special terms and conditions printed on such ticket.

Where a railroad company whose road connects with other roads receives baggage for transportation beyond the termination of its own line, it is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier; but any one of the companies may agree that its liability shall extend over the whole route.

The sale of a through ticket is a fact that may be taken into account in determining what the undertaking of the company issuing the ticket was; but such facts and circumstances growing out of the negotiations of the parties, or otherwise arising, ought to be shown, as make it evident that it was the understanding and agreement on both sides that the company selling the ticket undertook to be responsible for the safety of the baggage over connecting lines through to its ultimate destination.

A passenger, in the absence of special contract, will only be entitled to recover the value for use of such articles lost, while in transit, as properly constitute baggage; and what articles come within the rule is to be determined according to circumstances.

At law.

*Wyman & Roehr* for plaintiff.

*Finches, Lynde & Miller* for defendant.

DYER, J. (*charging jury*).—This is a suit to recover from the defendant, the New York, Lake Erie & Western R. R. Co., the value of certain lost baggage shipped from New York in June, 1882, over the defendant's line of road and destined for Weyauwega, Wisconsin. Many of the facts relating to the shipment and transportation of the baggage in question are undisputed. It

seems that the plaintiff and his family and one Schelongowsky were a party of seven emigrants from Germany, who, on their arrival in New York, desired to obtain transportation for themselves and their luggage to Weyauwega, their point of ultimate destination. To that end the plaintiff's daughter applied to an agent of the defendant, at his office in New York, for passage-tickets over the defendant's railroad and connecting lines of road, by means of which they and their baggage should be carried to Wisconsin. As a result of negotiations with the agent, the plaintiff, by his said daughter, purchased three third-class coupon tickets for each person in the party, one of which was a ticket from New York to Chicago over the defendant's road to Salamanca, thence over the New York, Pennsylvania & Ohio R. R. to Mansfield, and thence over the Pittsburgh, Fort Wayne & Chicago R. R. to Chicago. The second ticket in the series was one from Chicago to Milwaukee, over the Chicago, Milwaukee & St. Paul R. R., and the third was a ticket from Milwaukee to Weyauwega, over the Wisconsin Central R. R. For all the tickets the agent was paid \$129.50. These tickets having been procured, the plaintiff and his companions then proceeded to Castle Garden, where their baggage was deposited, and there received checks for the same over the defendant's road and connecting roads to Chicago. The baggage thus checked, including the box in question, was then carried by boat across the river to Jersey City, and there seems to be no doubt that it was placed on the train upon which the plaintiff and his family took passage for Chicago.

When near Chicago, and while yet on board the cars, the plaintiff and his associates surrendered their checks to a railroad official, taking in exchange the checks furnished by that official; and after their arrival at the station, and while they were in the depot waiting-room, they exchanged those checks for six joint checks of the Chicago, Milwaukee & St. Paul and Wisconsin Central roads; these checks being given for the carriage of their luggage from Chicago to Weyauwega. It appears that all of the baggage in due time arrived at Weyauwega, except the box in question, the loss of which has occasioned this suit. It seems that the plaintiff and his companions did not see any of their baggage in Chicago, but the undisputed evidence establishes the fact that it all arrived at the Chicago depot; and that the loss occurred after that time appears quite evident from the fact that all the other pieces of baggage rechecked in the manner before stated arrived safely at Weyauwega. All the passage-tickets received in New York were labelled "New York, Lake Erie & Western R. R. Co.;" and upon all of them was printed in the English language the following:

"Subject to the following conditions and regulations: In consideration of the reduced fare at which this ticket is sold, it will be valid only for one continuous third-class passage, if used to destination before midnight of the date cancelled on the margin of this

contract. And this ticket will be good only when officially stamped and dated, and upon presentation with checks attached. The checks belonging to this ticket will not be received if detached, nor will this ticket be recognized for passage if more than one date is punched out. In selling this ticket for passage over other roads this company acts only as agent for them, and assumes no responsibility beyond its own line. None of the companies represented in this ticket will assume any liability on baggage except for wearing-apparel, and then only for a sum not exceeding \$50 in value. No stop-over allowed."

Each of the tickets stated on its face that it was a "third-class ticket, good for one continuous third-class passage;" the first of the series covering such passage from New York to Chicago; the second, from Chicago to Milwaukee; and the third, from Milwaukee to Weyauwega. The coupons respectively named the different lines of road on which the tickets were receivable, and each coupon was indorsed "Special ticket; subject to conditions of contract."

The uncontradicted testimony on the part of the plaintiff is that neither the plaintiff, nor his daughter who bought the ticket, nor any of their party, could speak, read, or understand the English language at the time the tickets were purchased; and there is no proof that the agent from whom the tickets were purchased read or explained to them, or called their attention to, the conditions printed on the tickets. The theory upon which the plaintiff seeks to recover in this action is that he made an express verbal contract with the agent of the defendant company for the transportation of himself and his fellow-travellers and their luggage from New York to Weyauwega; by which alleged contract he claims the defendant undertook to furnish safe carriage for passengers and baggage, not only over defendant's road, but over the connecting lines named, to the place of ultimate destination; that it was one entire through contract, creating a liability on the part of the defendant for the safe transportation of baggage as well over the Chicago, Milwaukee & St. Paul and Wisconsin Central roads as over the road of the defendant company, and therefore that the defendant is liable for the loss of the box in question, although that loss may not have occurred on its road.

The contention of the defendant is—First, that it did not make such a contract as is alleged by the plaintiff, and that the evidence on the part of the plaintiff does not establish such a contract; secondly, that the contract between the parties was expressed on the face of the tickets; that it consisted of the conditions and limitations printed thereon, and that the defendant's liability for baggage was therein limited to loss occurring on its own line, and to wearing-apparel not exceeding \$50 in value. The issuance of the passage-tickets mentioned, their acceptance by the plaintiff, the omission of the defendant's agent to explain to the plaintiff, or his



daughter who purchased them, what was printed on their face, and the inability of the parties who obtained the tickets to read the statements and conditions printed thereon, and their consequent ignorance of the same, being undisputed facts in the case, there seems to be nothing to submit to the jury upon the question whether or not the conditions and regulations expressed on the face of the tickets constituted the contract between the parties. As the question is here presented, it is one of law to be determined by the court.

There are many reported cases in which it has been held that, where the shipper of property over a line of railroad receives from the carrier a bill of lading containing limitations upon its common-law liability, such bill of lading constitutes the contract of shipment, binding upon the shipper, and that he cannot thereafter avoid the limitations of liability expressed therein in favor of the carrier by pleading ignorance of the contents of the bill of lading. This is the principle invoked by the defendant in support of its contention that the tickets issued in this case, with the conditions and qualifications of liability thereon expressed, constituted the contract under which the baggage in question was carried. As to railroad passage-tickets, there are other decisions which hold that the liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances of the transaction are such as to make the omission of the passenger to read the conditions on the ticket negligence *per se*; that is, such as to make the omission of itself negligence. Thus, a distinction is taken between the case of a shipper receiving a bill of lading on account of his shipment and a traveller receiving a passage-ticket for the carriage of himself and baggage over the carrier's road. I think there is ground for the distinction. In the one case the shipper is supposed to understand and know that according to commercial usage a bill of lading is essential to the regular and safe transportation of property which is shipped and carried as freight, and that of necessity it must constitute the contract of shipment and carriage. In the other case, the ticket is ordinarily regarded as a mere voucher for the money paid for it, a token or evidence of the purchaser's right to be carried, or to have his baggage carried, a certain distance. And where, from the undisputed circumstances of the transaction, it is apparent that the passenger rightfully took the ticket as a mere receipt or voucher evidencing his right to be carried, and enabling him to follow and identify his property, and without any notice that it embodied the terms of a special contract, or was intended to subserve any other purpose than that of a voucher, it would seem that his omission to read the

DISTINCTION BETWEEN TICKETS AND BILLS OF LADING IN RESPECT TO CONTRACTS.

paper ought not to be held negligence, and that, as matter of law, he should not be held bound by limitations of which he had no knowledge, and to which, therefore, he did not assent, especially where, as in this case, the purchaser was unable to read the English language, and was ignorant not only of the printed matter on the ticket, but of the ways of business in this country.

Since the decisions of the courts on this subject are not entirely harmonious, I rule upon this question not without some hesitation: but for the purposes of this trial, and subject to review by the full bench, if a review shall become necessary, I instruct you upon the undisputed facts, as developed on this branch of the case, that the plaintiff was not bound by the special terms and conditions printed on these tickets; and that whatever legal rights he may have acquired by his purchase of the tickets are unaffected by those conditions. The question is then presented, did the agent of the defendant company, by express verbal contract, undertake, in defendant's behalf, with the person who purchased these tickets, to safely carry the baggage in question to Weyauwega,—a point confessedly beyond the termination of the defendant's line,—and there deliver

DUTY AS TO DELIVERING GOODS TO CONNECTING LINES.

it to the owners? The law relating to this branch of the case, at least in the federal courts, is this: If a railroad company, whose road connects with other roads, receives goods for transportation beyond the termination of its own line, its duty is to deliver safely the goods to the next connecting line,—the next carrier on the route beyond. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. Each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier; but any one of the companies may agree that its liability shall extend over the whole route. In the absence of a special agreement to that effect, such liability will not attach. *Myrick v. Michigan Cent. R. R. Co.*, 107 U. S. 106. If, therefore, the defendant in this case, the New York, Lake Erie & Western R. R. Co., carried the baggage in question safely to Chicago and there delivered it to the next carrier in the line, the Chicago, Milwaukee & St. Paul R. R. Co., then it performed its whole duty, unless it specially agreed with the owners of the baggage in New York that it would carry the baggage through, or would undertake or be responsible for its carriage through to its final destination. Did the defendant so contract with the owners of this baggage? If it did not, then it performed its whole duty if it delivered the property safely to the next carrier in Chicago.

Now, the question of fact for you to determine is, did the defendant make such a special agreement with these parties when they purchased their tickets? Such an agreement ought not to be

inferred from doubtful expressions or loose language, AGREEMENT AS TO LIMITING LIABILITY. but only from clear and satisfactory evidence. If, for example, I go to the agent of a railroad company in New York, and ask him if he can sell me tickets for myself and baggage over his line of road and other connecting lines to Ashland, Wisconsin, and he says he can, and he sells me such tickets, and that is all there is of the transaction, I think that would not be sufficient of itself to establish a contract on the part of the New York company for the safe carriage of my baggage beyond its own line. Of course, the sale of through tickets is a fact that may be taken into account in determining what the undertaking of the company issuing the tickets is; but such facts and circumstances growing out of the negotiations of the parties, or otherwise arising, ought to be shown as disclosing an understanding and agreement on both sides that the company selling the tickets undertook to be responsible for the safety of the baggage over other lines of road than its own through to its ultimate destination. Now, in view of what transpired between these parties and the agent in New York, in view of all the facts and circumstances attending the purchase of the tickets, did or did not the defendant so undertake and agree? If you find that such was the agreement or undertaking of the defendant, then your verdict should be for the plaintiff. If you do not so find, then your verdict should be in favor of the defendant.

If you should find for the plaintiff, the next question to be determined is, what is the extent of the defendant's liability? For the loss of what goods is the plaintiff entitled to be compensated, if entitled to recover at all? The box in question contained a variety of articles, all of which have been fully enumerated by the witness testifying on the subject, and which at the time of the loss were owned by different persons,—some by the plaintiff, others by different members of his family, and still others by Schelongowsky. The plaintiff has produced in evidence an assignment to himself from the other parties in interest of all claims and rights of action accruing to them on account of the loss of such of the enumerated articles as belonged to them respectively. I do not understand the validity of this assignment to be questioned, and so the plaintiff stands here as the sole claimant for the entire loss.

The plaintiff's claim must be limited to baggage. But the question is, what is baggage? The rule on this subject can BAGGAGE DEFINED. only be stated in general terms. The question what articles come within the rule is to be determined by the jury according to the circumstances of the case. Baggage, of course, includes wearing-apparel, and this is not limited to such apparel only as the traveller must necessarily use on his journey. Regard being had to the condition in life of these parties, the plaintiff may recover—if entitled to recover all—for the loss of all such wearing-apparel as these people had provided for their personal use, and as

it would be necessary or reasonable for them to use after their arrival and settlement in this country. And so I think that cloth not yet made into garments, but which they may have procured for manufacture into wearing-apparel, and which they intended to make such use of, to a reasonable amount, may properly be included as part and parcel of their wearing-apparel. So, too, these parties had the right to carry as baggage such jewelry and personal ornaments as were appropriate to their wardrobe, rank, and social position, but no further. As to bedding and bed-furnishings not intended for use on the journey,—curtains, table-cloths, and covers, books, pictures, and albums,—they come under the head of household goods, and not personal baggage, and cannot be recovered for, and must be excluded from your consideration, unless you find that the agent of the defendant company, when he sold the tickets, was informed or understood that the baggage which was to be carried with the passengers included articles of this character. Of course, if the defendant was informed that this box contained household goods as well as wearing-apparel, or had good reason to understand and know that such was the fact, and then consented to accept the property as baggage under check, if liable at all, it is liable therefor the same as for wearing-apparel, otherwise not. So, too, the painter's utensils and drawings and the tailor's utensils enumerated in the list of articles lost cannot be included as baggage; and for the loss of this property the plaintiff is not entitled to recover unless it is made to appear that the defendant knew or understood that such articles were in the box and accepted them as baggage.

If your conclusion shall be that under the evidence the plaintiff is entitled to recover, you will consider this question of DAMAGES FOR BAGGAGE LOST. what constituted the baggage of these parties with care, and within the limitations I have stated; and in determining the amount of the recovery you will ascertain what was the fair and reasonable value of the articles for which the plaintiff should be compensated. This value will depend upon the age and character of the articles, and the use for which they were intended. Of course the question is not what they could have been sold for in money, but what was their fair and reasonable value for use to the parties who owned them at the time of their loss.

The jury rendered a verdict for plaintiff, and on motion for a new trial, argued before the circuit and district judges, the foregoing instructions to the jury were approved.

**Limiting Liability for Baggage.**—The question whether a railway company has limited its liability for baggage is one of evidence. Leaving out of consideration limitations of liability for negligence, the question is: Has the baggage-owner been notified of the proposed limitation by the company, and has he agreed thereto? If he has, then a valid limitation of liability has been created.

The first thing, therefore, for railway companies desirous of so limiting

their liability to do is to notify the passenger of the nature and extent of the limitation. Of course this may be done by the ticket agent personally and verbally, telling the purchaser of a ticket that the company limits its liability for baggage and requires him to agree to such limitation; and sometimes it may be done by notice posted up or printed on the tickets issued.

The second thing is to secure the assent of the passenger to the contract of limitation. If he consents expressly, either orally or in writing, there is obviously a completed contract—a proposition on one side and the acceptance thereof on the other; and in some cases assent may be inferred. The cases with reference to these two matters, the proposition to limit and the acceptance thereof, may be easily grouped.

1. The proposition to limit. This must be in a language that the traveller can understand. Therefore a notice of a limitation of liability given in English to a German who could not understand English was held insufficient in *Camden, etc., R. R. Co. v. Baldauf*, 18 Pa. St. 67, in which the court said: "The plaintiff is a German, wholly ignorant of the English language. It is therefore the case of a passenger uninformed of the terms and conditions of the notice appended to the ticket on which the defendants rely for protection. . . . It in truth would be absurd to hold, under the circumstances, the company exempted from their common-law responsibilities on the foot of a special or express contract, when he was ignorant of the terms of the proposed agreement. Granting that tickets in any case, without more, may be considered as evidence of a special agreement, it is surely not exacting too much to require the carrier to have his tickets printed and his advertisements made in a language which the passenger can understand, or that he should be required to explain to him the nature and effect of the proposed agreement." But see *Fibel v. Livingston*, 64 Barb. N. Y. 179.

In some cases the ticket itself is notice enough of a proposition to limit liability printed thereupon. This was so decided with reference to a steamship ticket in *Steers v. Liverpool, etc., Co.* 57 N. Y. 1. So also as to commutation tickets. *Cresson v. Phila., etc., R. R. Co.*, 11 Phila. 597; s. c., 32 Leg. Int. 363.

2. Acceptance of the proposition. Of course acceptance may be express, but it is the cases wherein the acceptance of the proposal to limit liability has been sought to be implied that present difficulties. Will assent be implied from the retention of a ticket with the limitation printed on it? It was decided that it would in *Steers v. Liverpool, etc., Co.*, 57 N. Y. 1, the court considering the purchase of a steamship ticket a matter of more deliberation and care than the purchase of a ticket for railway transit, and that the buyer might be presumed to have read its conditions and to have assented thereto, so as to make them part of the contract. So applying for a pass, taking it, retaining it six or eight hours before train-time, and having his (the traveller's) attention expressly called to its terms, and then actually riding on the ticket, is evidence of assent to a limitation printed on the pass. *Perkins v. N. Y. Central, etc., R. R. Co.* 24 N. Y., 196. So assent will be inferred from the taking, retention, and constant use of a commutation ticket. *Cresson v. Phila., etc., R. R. Co.*, 11 Phila. 597; s. c., 32 Leg. Int. 363. See also *Louisville, etc., R. R. Co. v. Harris*, 9 Lea (Tenn.), 80; s. c., 42 Am. Rep. 668; *Bland v. So. Pac. R. R. Co.*, 55 Cal. 570; s. c., 8 Am. & Eng. R. R. Cas. 285; s. c., 36 Am. Rep. 50; *Hoffbauer v. Delhi, etc., R. R. Co.*, 52 Iowa, 342; s. c., 35 Am. Rep. 278; *Auerbach v. N. Y. Central, etc., R. R. Co.*, 6 Am. & Eng. R. R. Cas. 334; s. c., 42 Am. Rep. 290; 89 N. Y. 281.

But the courts in the following cases refused to infer assent to a contract limiting liability from the receipt of a ticket having a limitation of liability printed upon it.

Where the ticket had printed upon it the following: "Passengers are not allowed to carry baggage beyond \$100 in value, and that personal, unless

notice is given and an extra amount paid at the rate of a price of a ticket for every \$500 in value." On the journey one of the trunks was lost, containing wearing-apparel and articles of ordinary baggage to the value of \$890, and other property to the value of \$730. *Held*, that, notwithstanding the memorandum printed on the ticket, the plaintiff is entitled to recover the value of his trunk, and of such portion of the contents as is ordinarily known and carried as traveller's baggage, although worth more than \$100, and though nothing extra was paid for baggage exceeding that sum in value. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. N. Y. 226.

A passenger bought a ticket to a place, but desired to "stop over" *en route* at an intermediate point. The ticket had printed on it, "Good for this day only," but the ticket agent assured the passenger that the conductor would issue a "stop-over check." This, the conductor, in obedience to orders from his superiors, refused to do, but left the ticket in possession of the passenger, who "stopped over," and, proceeding on his journey at a later day, presented it to the conductor, who refused to accept it and demanded fare. This was refused and the passenger ejected. *Held*, that the ticket was not the sole evidence of the contract to carry the passenger, but that evidence of the conversation with the ticket agent might be introduced, under which the passenger had a right to stop over, and might recover for his expulsion. *Burnham v. Grand T. R. R. Co.*, 63 Me. 298.

Defendant's agent came into a railway car in which plaintiff was travelling and called for baggage. He received the check for plaintiff's trunk, with directions as to its delivery, and marked on a blank receipt the date, number of check, and place of delivery, which he handed to plaintiff, without anything being said as to its contents. The car was dimly lighted so that plaintiff from where he sat could not have read the receipt, and, without looking at it or reading it, he put it in his pocket. The receipt was marked upon the margin, "Domestic bill of lading," and purported to be a contract relieving defendant from or limiting its liability in certain specified cases, and in particular limiting its liability, save in case of a special contract, to \$100. The court refused to charge that the delivery of the receipt created a contract for the carriage of the trunk under the terms printed thereupon, and limited defendant's liability to amount specified, but submitted the question to a jury. *Madan v. Sherard*, 73 N. Y. 380.

The plaintiff's daughter, accompanied by another young girl, delivered a check for a trunk to a transfer company in New York, with directions to carry it to her home in Brooklyn. She was about to leave the office, when, at her companion's suggestion that she ought to have a receipt, she returned to the desk, and demanded one of the clerk, who handed her a receipt, in which it was stipulated that the company should not be liable to an amount exceeding \$100, unless a special contract was made. The trunk and contents were worth \$300, but nothing was said as to its value; neither did she read the receipt or see the contents until after the loss of the trunk. *Held*, that the notice was ineffectual. *Woodruff v. Sherard*, 9 Hun (N. Y.), 322.

Another case decides that there is no presumption of law that a passenger on a railroad has read a notice limiting the liability of a railroad company for baggage, printed on the back of a passenger's check, delivered with his ticket, and having on its face the words "Look on the back!" whereon notice of such limitation of liability was printed in small type. Nor is there any presumption of notice of similar limitations contained in placards posted in the cars. But the court expressly refrained from adjudicating "upon the broader question, whether a limitation of the liability of a railroad company as to the amount and value of the baggage of passengers transported on the road may not be effectually secured by the delivery of a ticket to the passenger, so printed in large and fair type, on the face of the ticket, that no one could read the part of the ticket indicating the place to which it purports to

entitle him to be conveyed without also having brought to his notice the fact of limitation as to liability for his baggage." *Malone v. Boston & W. R. R. Co.*, 12 Gray (Mass.), 388.

The agent of an expressman entered a railway coach, took up the check of a passenger desiring his valise delivered, and gave such passenger a receipt for the check, having a special contract limiting the expressman's liability printed on one side of such receipt. The special contract was printed in very small type on the side of the receipt, and the passenger could not read it in the dimly lighted car. *Held*, that the acceptance of it did not make it a contract between himself and the expressman. The court expressly distinguished such a receipt from a bill of lading. As to bills of lading and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. But checks for baggage are not of that character, nor is such a card as was delivered in this instance. It was, at least, equivocal in its character. In such a case a person is not presumed to know its contents or to assent to them. *Blossom v. Dodd*, 43 N. Y. 264. In *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64, A, a passenger on a railroad, delivered to an expressman a metallic check which he had received for his trunk, as baggage, so that the expressman might obtain the trunk and deliver it at the residence of A, who received from the expressman at the time a piece of paper on which the number of the check was indorsed, and which contained a printed notice that the expressman would "not become liable for merchandise or jewelry contained in baggage received upon baggage-checks, nor for loss by fire, nor for an amount exceeding \$100 upon any article, unless specially agreed for in writing on this check receipt, and the extra risk paid therefor. And the owner hereby agrees that Westcott Express Co. shall be liable only as above." It was held that A was chargeable with actual notice of the contents of this paper, and bound thereby. But the court evidently was unwilling to allow this ruling to release the expressman from liability for the value of the baggage in excess of \$100, for it held that the words "any article" did not mean the trunk or piece of baggage and its entire contents in gross, but meant any article contained in the piece of baggage, and there being no single article worth more than \$100, judgment was rendered for the value of all the articles together, aggregating \$700.

In the United States courts this rule has always been very strongly laid down. Thus, in *The Pacific, Deady* (U. S.), 17, it was declared that in the federal courts, while the rule is that a common carrier may limit his liability, except for negligence, by express agreement, nothing short of an express stipulation will constitute such an agreement. It must not depend upon implication or inference or conflicting evidence, and mere notice to the shipper is not sufficient. Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship for the same, marked "not accountable for contents," this of itself does not constitute an agreement limiting the carrier's liability; it is not a mere *ex parte* proposition on the part of the carrier after receiving the package, to which there must be direct and unequivocal evidence of the assent of the shipper to exonerate the carrier. See also *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.), 344; and *Railroad Co. v. Manufg Co.*, 16 Wall. (U. S.), 318.

McCORMICK, Respondent,

v.

THE PENNSYLVANIA CENTRAL R. R. Co., Appellant.

(99 *New York Reports*, 65.)

In an action for an alleged conversion of certain trunks and their contents, it appeared that plaintiff, with his family and baggage (nine trunks), went to defendant's depot to take passage to Chicago. The baggage-master demanded an additional sum for extra baggage, and refused to deliver checks unless it was paid. Plaintiff refused to pay and demanded his baggage, which the baggage-master refused to deliver for the alleged reason that it had been placed in the baggage-van in such a position as to make it inconvenient or impossible to redeliver it in time for the train to depart on schedule time. Plaintiff's evidence, however, tended to show that the baggage was in plain sight and accessible in the van, and that there was sufficient time to remove it. Plaintiff refused to take passage and left the baggage in defendant's possession. The next day plaintiff called on defendant's president, who promised that the baggage should be stopped at Pittsburg and delivered to plaintiff there, and gave the latter an order authorizing him to receive it without checks; he, with his family, thereupon took passage on defendant's road for Chicago; on arriving at Pittsburg he applied to defendant's baggage-master for his baggage, but was informed that it had gone on to Chicago. The baggage-master gave him an order directing the agent at Chicago to deliver the baggage to him on demand. It arrived at Chicago that day, and was stored in defendant's depot, and the following night the depot with a greater portion of the baggage was destroyed by fire. Plaintiff stopped over one train and arrived at Chicago the next day. *Held*, that the facts authorized a finding of a conversion of the baggage at Philadelphia, and that there was not, subsequently, such a renewal of the relations of carrier and passenger, and such a resumption of possession and control thereof by defendant as constituted a waiver of any claim except for nominal damages for such conversion; that, assuming the original wrongful conversion, a duty rested upon defendant, if it desired to escape liability, to replace in the actual custody and possession of plaintiff the property wrongfully taken from him.

McCormick v. P. C. R. R. Co. (80 N. Y. 353), distinguished.

Plaintiff and his wife were married in Illinois in 1858. By a statute of that State, passed in 1862, it is enacted that the separate property of a married woman, and property acquired by her in good faith during coverture, from any person other than her husband, shall remain her sole and separate property. A portion of the property destroyed consisted of articles of clothing and ornaments of the wife, given to her by plaintiff prior to the passage of said act. *Held*, that plaintiff was entitled to recover therefor.

A party to an action is not estopped from contradicting the testimony of an adverse witness on a material point in issue, by the fact that upon two former trials of the action the same testimony was given and was not contradicted by him. The fact simply is to be taken into account by the jury in considering the weight and credibility of the evidence.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made



June 1, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirming an order denying a motion for a new trial.

This action was brought for the alleged conversion of certain trunks and their contents, constituting the baggage of plaintiff and his family.

It is reported on former appeals in 49 N. Y. 303, and 80 Id.; s. c., 2 Am. & Eng. R. R. Cas. 635, 353.

The material facts are stated in the opinion.

*Charles M. Da Costa* for appellant.

*Roscoe Conkling* for respondent.

RUGER, Ch. J.—The verdict of the jury has determined all disputed questions of fact in the case in favor of the plaintiff, and prior adjudications upon former appeals to this court have also settled the principal questions of law involved in the controversy. 49 N. Y. 303; 80 Id. 353. It was held upon such appeals that the proof of circumstances, attending the delivery of his baggage, by the plaintiff to the defendant, on March 11, 1862, at Philadelphia, and the subsequent refusal of the defendant to redeliver it upon plaintiff's request, was evidence from which a jury were authorized to find its conversion by the defendant at that time. The facts upon which this proposition was based have, so far as the defendant's claim is concerned, remained substantially unchanged through the subsequent trials of the case. CONVERSION OF BAGGAGE. As related by the plaintiff, whose testimony has been approved by the verdict of the jury and is therefore conclusive upon an appellate tribunal, they were substantially as follows: On March 11, 1862, between 10 and 11 o'clock P.M., and about twenty minutes before the schedule time for starting the train, the plaintiff with his family arrived at the depot of the defendant in Philadelphia, with his baggage, consisting of nine pieces, for the purpose of taking passage for Chicago. While there, a controversy arose between the defendant's baggage-master and the plaintiff with reference to the payment of an additional charge for extra baggage. The plaintiff refused to pay it, and the baggage-master refused to deliver checks for the baggage until it was paid. The plaintiff several times demanded either the return of his baggage or the delivery of checks therefor, and the baggage-master as often refused to deliver the checks until the additional charge was paid, or to return the baggage. The baggage-master testified that he alleged as a reason for not returning the baggage that the train was about to start, and it had been placed in the van in such a position as to make it inconvenient or impossible to reach it and redeliver it in season for the train to depart upon its schedule time; on the other hand, the plaintiff's evidence tended to show that the baggage was in plain sight and accessible in the van, and that there was sufficient time to

remove and deliver it to the plaintiff before the time for the starting of the train would expire. Under these circumstances, the plaintiff refused to take passage on the train, and, leaving his baggage in the possession of the defendant, returned to the hotel, where he remained with his family until the next day. The baggage-master claimed that he first refused to deliver the checks, on the ground that the plaintiff had not then procured his tickets; but the plaintiff testifies that, to the best of his recollection, he had his tickets when he first applied for checks, and under the rule referred to we must assume that his version of the transaction has been adopted by the jury as correct. The morning after these occurrences the plaintiff called on Mr. Thompson, the president of the defendant, and explained the transactions of the previous evening to him. The conversation resulted in the plaintiff's obtaining an order authorizing him to receive his baggage at Pittsburg from the defendant's agent there, without the necessity of producing checks therefor, and a promise on the part of the defendant that it would cause the baggage to be stopped at Pittsburg and delivered to him upon demand. The plaintiff with his family thereafter took passage on the defendant's train for Chicago, and started upon their journey the evening of March 12. On arriving at Pittsburg the following day, he applied to the defendant's baggage-agent for his baggage, but was informed that by some inadvertence it had not been taken off on its arrival there, but had gone on to Chicago. The baggage-master then indorsed an order upon a copy of that addressed to him, directing the baggage-agent at Chicago to deliver the baggage in question to the plaintiff on demand at that place without checks. The plaintiff's family continued their passage to Chicago on the same train, but he himself laid over for one train at some place on the route, and did not arrive at his destination until the 14th, after the destruction of his baggage. In the night following the 18th, the defendant's depot at Chicago was struck by lightning and set on fire, and was consumed with its contents. Some small portion of the plaintiff's baggage, which had been stored in the depot by the defendant, was preserved, and afterward returned to and accepted by him.

When the case was before this court as reported in the 80th N. Y. 353; s. c., 2 Am. & Eng. R. R. Cas. 635, the facts were in some material respects different from those now appearing, and it was held upon the case then presented that the subsequent negotiations and agreements taking place between the plaintiff and defendant as to a redelivery of the baggage at Pittsburg, and when those arrangements failed, its continued transportation to Chicago, the original place of its destination, sanctioned and approved by the plaintiff, constituted a resumption of the control of the baggage by him, and a renewal of the relations of passenger and carrier previously existing between the parties which relieved the

defendant from any liability for its original conversion, except for nominal damages.

Upon the last trial the case was conducted by the plaintiff upon the theory of such a change in the proof as to the circumstances following the original conversion as precluded any assumption that he had recovered possession or control of his baggage, or had resumed, with the defendant, the relations existing between a passenger with his baggage and a carrier at any time after the alleged conversion by the defendant. Evidence was given by the plaintiff controverting the principal circumstances upon which the ruling of this court in the 80th of N. Y., in respect to the waiver of the cause of action, was based, and tending to show that he never exercised any control over his baggage, or resumed his relations as a passenger with the defendant, at any time after the original conversion. At the conclusion of the plaintiff's evidence no motion to nonsuit was made, or question raised by the defendant as to the plaintiff's right to recover upon the case as then made. The defendant, however, thereafter gave evidence tending to show that at plaintiff's request it gave orders to have the baggage taken off the cars at Pittsburg when the train arrived there, and for its delivery to the plaintiff, and that he consented to accept it there, and received an order from defendant's general baggage agent at Philadelphia upon its baggage agent at Pittsburg directing him to deliver such baggage to the plaintiff upon request without requiring the production and delivery of checks therefor by him. The defendant gave further proof tending to show that the plaintiff had subsequently countermanded the direction to stop the baggage at Pittsburg, and requested that its transportation be continued to Chicago, and when he learned that it had not been taken off the train at Pittsburg he expressed his approval of the course pursued by the defendant in forwarding the baggage. The plaintiff's evidence in rebuttal tended to show that he accepted defendant's offer to redeliver the baggage to him at Pittsburg on his arrival there, but contradicted the proof that he countermanded the request for its delivery there, or ever authorized or approved its continued transportation to Chicago.

Upon this contradictory and conflicting evidence the trial court submitted the question to the jury in language embraced in a request of the defendant to determine the truth of the matter, and whether there had been such a countermand of the order to stop the baggage at Pittsburg, and approval of its continued transportation to Chicago, as constituted a waiver of the original conversion, and charged them if they should credit the testimony of the defendant's witnesses the plaintiff would be estopped from claiming that his baggage was converted at Philadelphia. The charge was quite as favorable to the defendant on the facts as it was entitled to, but the verdict was for the plaintiff.

WAIVER OF CON-  
VERSION.]

Several grounds are now urged by the appellant for a reversal of the judgment entered upon such verdict which we will briefly notice. The several exceptions taken to the refusal of the court to charge the various propositions made by the defendant, based upon the assumption that there was not sufficient evidence of a conversion of the plaintiff's property by the defendant in the transactions occurring between its baggage-master and the plaintiff at Philadelphia, on the 11th of March, to authorize a verdict for the plaintiff, are untenable. The case is much more favorable on this appeal for the plaintiff's claim, in respect to such conversion, than it has ever before appeared; and if it was proper now to re-examine the grounds upon which the claim is founded we should feel constrained to arrive at the same conclusion upon that question which was reached by the court upon the former appeals. A quite sufficient reason for the result reached now appears in the evidence given for the first time on the last trial as to the practicability of the delivery of the baggage to the plaintiff by the baggage-master at Philadelphia when its return was demanded of him. This evidence tends to deprive the defendant of any excuse for its conduct in refusing to return the baggage, and renders the verdict of the jury, on the question of a conversion, unassailable upon any ground now available to the defendant.

We are also of the opinion that the defendant's several requests to charge that the evidence of the negotiations had between the plaintiff and defendant on the 12th of March, and the subsequent conduct of the plaintiff relating to his baggage, was such a renewal of the relations of carrier and passenger between him and the defendant, and such a resumption of the possession and control of his baggage by the plaintiff, as constituted a waiver of any claim for damages on account of the previous conversion, except such as were nominal, were properly refused by the court. The material facts upon which the opinion of the court was based on the former appeal were not confirmed by the evidence given on the last trial, and the only fact bearing upon that question which we are now authorized to consider under the verdict of the jury is the ineffectual efforts of the plaintiff to procure a return of his baggage at Pittsburg and Chicago. The evidence now disproves the idea that the plaintiff had any possession or control of his baggage after he originally parted with it to the defendant, or that his subsequent transportation over the defendant's road had any relation to the previous attempt to secure such transportation.

The case, as now presented, shows an original wrongful detention of the plaintiff's property by the defendant, and a defeat, through the negligent or wilful misconduct of the defendant and its servants in carrying it beyond the point agreed upon for its redelivery, of every effort on the part of

EVIDENCE OF  
CONVERSION.

RENEWAL OF RE-  
LATION OF CAR-  
RIER AND PAS-  
SENGER.

LIABILITY FOR  
BAGGAGE CON-  
VERTED.

the plaintiff to regain its possession. The liability incurred by the defendant through its wrongful refusal to give up the property to the plaintiff at Philadelphia has been in no manner modified or changed by what took place subsequently, except in respect to such part of the property as the plaintiff actually received from the defendant after the loss at Chicago. Assuming its original wrongful conversion, as we must, upon the evidence, a duty rested upon the defendant, if it desired to escape liability therefor, to replace in the actual custody and possession of the plaintiff the property wrongfully taken from him. This, however, it did not do before its destruction, and after that event it of course became impossible. The defendant has therefore failed to relieve itself of the liability originally incurred. The defendant has also again attempted to raise a question over the plaintiff's right to recover damages for such part of the property lost as constituted the ornaments and wearing-apparel of his wife. This claim is based upon the ground that under the statutes of Illinois, the place of plaintiff's residence, such property belonged to the wife, and an action for its loss could be maintained by her alone. The facts of the case in respect to this question have not been materially changed since the trial, which was reviewed in the 49th New York, 303, and where it was held that such articles constituted a part of the wife's paraphernalia, and the right of property in which, under the rule of the common law, was in the husband. The evidence tended to show that the property in question was purchased by the plaintiff and given to his wife upon their marriage, in 1858, previous to the passage of any statute in Illinois changing the rule of the common law as to the ownership of such property. The evidence to this effect was positive as to most of the articles in question, and presumptively so as to all of them, and we see no reason for questioning the conclusion arrived at by this court on the former appeal, upon this branch of the case.

The appellant also urged, as a ground for reversing the judgment, that the court should refuse to credit so much of the evidence of the plaintiff given upon the last trial as contradicts the evidence given by the defendant's witnesses, to the effect that the plaintiff had countermanded the directions to have his baggage stopped at Pittsburg, and expressed his satisfaction after learning the fact that it had not been stopped, and had been passed on to Chicago. The principle of law upon which this claim is made is stated in defendant's brief in these words: "It is not competent, as matter of law, for a party to an action to attempt to contradict for the first time, on the third trial of a cause, the evidence of an adverse witness on a material point at issue, given in such party's presence on the two previous trials." No authority is cited to sustain this proposition, and we think none can be found. It is true that the circumstances under

RECOVERY FOR  
ORNAMENTS, ETC.,  
OF WIFE LOST  
WITH HUSBAND'S  
BAGGAGE.

CONTRADICTION  
ADVERSE WIT-  
NESSES.

which such evidence is given would bear strongly upon the credit of the witness testifying, and could well be taken into account by the jury in considering the weight and credibility of the evidence; but it seems to us an extraordinary proposition to claim, as matter of law, that the mere omission of a party to contradict the statement of an adverse witness under such circumstances would authorize the court wholly to disregard his evidence.

It further appears in this case, however, that the plaintiff's omission to contradict this evidence on the previous trials was explained by other evidence in a manner entirely inconsistent with his truth and integrity.

We see no error occurring on the trial which authorizes a reversal of the judgment appealed from, and it should, therefore, be affirmed. All concur.

Judgment affirmed.

## LAKE SHORE AND MICHIGAN SOUTHERN R. R. Co.

v.

WARREN.

(Advance Case, Wyoming. April 21, 1885.)

Under the Code of Wyoming, compiled laws, page 45, section 91, a defendant has the right to plead any number of defences which are not inconsistent in fact; and in determining this right two statements should never be held inconsistent if both may be true. On the trial the defendant may avail himself of each defence which he may properly set forth in his answer, and will not be concluded from proving the truth of one plea by any implied admissions contained in another, or by implication of law arising therefrom.

A common carrier, who has received the baggage of a passenger for transportation, and refuses to deliver it at the place of destination, cannot relieve himself from liability for its loss by tendering the baggage more than a year after the demand therefor was made.

In case of loss or injury to baggage, through the carrier's fault, the measure of damages is the value of the baggage at the place of destination. In such case the value of clothing carried as baggage is its value to the owner for use, and not merely what it could be sold for in money.

ERROR to the district court. The opinion states the facts.

*C. N. Potter* for the plaintiff in error.

*W. W. Corlett* for the defendant in error.

LACY, C. J.—This action was brought by the defendant in error to recover the value of a certain trunk and its contents, alleged to be his property. The petition avers that the plaintiff in error is a common carrier, and, as such, on October 6, 1881, received the wife of the defendant in error as a passenger into its

cars with the trunk, as her baggage, containing necessary wearing apparel of herself and infant child, to be carried from Chicago, Illinois, to Boston, Massachusetts; but that, through negligence, the plaintiff in error had suffered said baggage to become lost, and, on demand, had failed and refused to redeliver the same to the defendant in error.

The plaintiff in error answered a general denial, and, at a subsequent term of court, filed what is termed a supplemental answer, consisting of:

1st. A general denial.

2d. A special plea averring that subsequent to the original answer—to wit, in February, 1883—the plaintiff in error had tendered the trunk and all its contents in good condition to the defendant in error at his place of residence in Cheyenne, Wyoming; that he had been at all times since said tender and then was ready to deliver said property to the defendant in error; and that said articles, by reason of their weight, bulk, and character, could not conveniently be brought into court.

A jury trial was had, resulting in a verdict for the defendant in error, upon which, after overruling a motion for a new trial, the court below entered judgment.

Without considering in detail the forty-one assignments in error, I think the record fairly raises these questions:

I. Did the answer of the plaintiff in error, taken as a whole, conclusively admit the cause of action stated in the petition, excepting, only the amount of damages?

II. Was the defendant in error, after action had been brought and after the original answer had been filed, bound to accept, when tendered, the property concerning which the action was brought, and recover only for the detention and any damage to the property?

III. If the defendant in error could refuse to receive the property when tendered, was the measure of damages the value of the property to the defendant in error at Cheyenne, Wyoming (his place of residence), at the time of the delivery of the same to the plaintiff in error at Chicago, Illinois, for transportation to Boston, Massachusetts. This question of course assumes, for the purposes of the question, that the plaintiff in error, as a common carrier, received the baggage as is alleged in the petition.

If the first and third questions above propounded be answered in the affirmative, and the second question be answered in the negative, then the rulings of the court below on the trial of the cause can be sustained, otherwise they must be held erroneous.

I. It seems unnecessary to point out the radically defective character of the second plea as an answer in bar.

The defendant in error contends that the first question must be answered in the affirmative, and as a basis for such an-  
 answer asserts, and with much skill and learning, main-

INCONSISTENT  
PLEADING AD-  
MISSIBLE.

tains the proposition that the special plea modified the general denial to the extent of all admissions contained in such special plea, whether those admissions be express or implied.

At common law double pleading was inadmissible, but the harshness of that rule led to the enactment of the following statute:—

“It shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with leave of the court to plead as many several matters thereto as he shall think necessary for his defence.” 4 Anne, ch. 16, sec. 4.

Under this statute, the ruling of the English courts has been that inconsistent pleas are admissible, and that the admissions in one plea are not available to the plaintiff against any other plea.

Statutes have been enacted in many of the States giving to the defendant the right, without reference to any leave of court, to plead as many several defences as he shall deem necessary, and in such States the courts follow the English ruling. *Farman v. Childs*, 66 Ill. 544; *Pope v. Welsh*, 18 Ala. 631; *Clements v. Cribbs*, 19 Ala. 241; *Child v. Allen*, 33 Vermont, 476; *Nadenbousch v. Sharer*, 2 W. Va. 285; *Fowler v. Davenport*, 21 Texas, 626; *Duncan v. Magette*, 25 Texas, 245; *Smith v. Sublett*, 23 Texas, 163; *Kimball v. Bellows*, 13 N. H. 58; *Hall v. Clement*, 41 N. H. 166; *Granite State Bank v. Otis*, 53 Me. 133; *Turner v. Beatty*, 34 N. J. Law, 644.

But the statute of this Territory is claimed to be substantially different from the statutes above referred to.

Our statute provides that “the defendant may set forth in his answer as many grounds of defence, counter-claim, and set-off as he may have.” Comp. Laws, page 45, sec. 91.

It is contended that this section does not permit inconsistent defences, since the defendant could not at the same time “have” two defences inconsistent with each other.

At least thirteen of the States have statutes substantially like ours. The courts of ten of these States hold that the statute does not require the several defences to be consistent, and that the admissions in one plea may not be used by the plaintiff under the issue joined upon any other plea. *Bell v. Brown*, 22 Cal. 671; *Siter v. Jewett*, 33 Cal. 92; *Buhne v. Corbett*, 43 Cal. 264; *Nudd v. Thompson*, 34 Cal. 39; *Billings v. Drew*, 52 Cal. 565; *Miller v. Chandler*, 59 Cal. 540; *Sumner v. Shipman*, 65 N. C. 623; *Horton v. Banner*, 6 Bush, 596; *Morris v. Henderson*, 37 Miss. 492; *Rowland v. Dalton*, 36 Miss. 702; *Clark v. Lyon County*, 7 Nev. 75; *Hall v. Austin*, 1 Deady, 104; *Moore v. Willamette T. and L. Co.*, 7 Oregon, 355; *Arnold v. Sturges*, 5 Blackf. 256; *Weston v. Lumley*, 33 Ind. 486; *Citizens' Bank v. Closson*, 29 Ohio St. 68; *Pavey v. Pavey*, 30 Ohio St. 600; *Cohrs v. Frazer*, 5 S. C. 351; *Swift v. Kingsley*, 24 Barb. 541; *Hollenbeck v. Clow*, 9 How. Pr. 289; *Bruce v. Burr*, 67 N. Y. 240.



The courts of last resort of three of the States having statutes similar to ours, hold that inconsistent pleas are not permitted by the statute, and that the admissions contained in one plea may be used by the plaintiff against other pleas, and are conclusive against the defendant. *Sexton v. Rhames*, 13 Wisc. 99; *Hartwell v. Page*, 14 Wisc. 49; *Orton v. Noonan*, 19 Wisc. 350; *Farrell v. Hennesy*, 21 Wisc. 642; *Dickson v. Cole*, 34 Wisc. 621; *Derby v. Gallup*, 5 Minn. 119; *Wiley v. Keokuk*, 6 Kansas, 94; *Butler v. Kaulback*, 8 Kansas, 668. The Missouri statute provides that: "The defendant may set forth by answer as many defences . . . as he may have," and that "different consistent defences may be separately stated in the same answer." Construing this statute the supreme court of that State says: "Some interpretation of the term 'consistent defences' should be adopted, if possible, that shall be consistent with the statute, and secure the right of full defence. That right will be secured if the consistency required be one of fact merely, and if two or more defences are held to be inconsistent when the proof of one necessarily disproves the other. Two statements are not inconsistent if both may be true." *Nelson v. Brodhack*, 44 Mo. 596; see, also, *Rhine v. Montgomery*, 50 Mo. 566; *McAdow v. Ross*, 53 Mo. 193; *State ex rel. Davis v. Rogers*, 79 Mo. 283.

In addition to giving the defendant the right to plead "as many several defences as he may have," our statute provides that pleadings "shall be liberally construed with a view to substantial justice between the parties." It seems to me that the right thus secured to the defendant is a substantial one; the right to set forth every defence which in fact exists, without reference to the technical conclusions or implications of law which might be drawn or might arise from some of those defences. That he has the right to plead any number of defences which are not inconsistent in fact, and that in determining this right two statements should never be held inconsistent if both may be true. It can hardly be necessary to add that the defendant, on the trial, may avail himself of each defence which he may properly set forth in his answer; that he will not be concluded from proving the truth of one plea by any implied admission contained in another, or by implication of law arising therefrom.

The above view is within the limits of the doctrine laid down by the overwhelming weight of authority. Moreover, I am not sure that it would conflict with the rulings of the supreme courts of Wisconsin, Minnesota, and Kansas, since the admissions in one plea which those courts have held conclusive against the defendant as against another plea were express. And see *Map Company v. Jones*, 27 Kansas, 177; *Warren v. Lockesby*, 31 Minn. 421; *Wheeler Mfg. Co. v. Teetzlaff*, 53 Wisc. 211; *Bliss on Code Pl.*, sections 342, 344.

In this case both pleas may be true. For example, for anything that appears in the pleas, the plaintiff in error may have come into possession of the property by finding after suit brought, and not otherwise, and having so received it may have offered to deliver it to the defendant in error. Indeed, this is the state of facts which the plaintiff in error offered to prove by its witness John L. Freeman, but was precluded from doing so by the ruling of the court on the ground that such evidence was incompetent, immaterial, and irrelevant. There was no proof that the plaintiff in error ever received the property except the implied admission contained in the special plea, and proof of the fact of the tender there-in set forth.

The court also gave to the jury the following instructions, among others:

"3. . . . and I further charge you that, under the pleadings in this case, it is admitted that before this action was brought there was a demand made upon defendant by the plaintiff for the baggage, and that defendant refused to deliver it. . . .

"4. All the allegations contained in the plaintiff's petition in this case you are to take as true, except the allegation as to the amount of damages alleged to have been sustained by plaintiff in consequence of the loss of the baggage in question.

"You have no right to find otherwise than that the defendant received the trunk and contents mentioned in the petition and became liable to redeliver them and failed to do so. All these matters are admitted by the defendant by the form and terms of its answer in this case, and you are bound to assume those facts as established."

It results from what has been said that the above ruling and instructions were erroneous.

It is not intended here to express any opinion as to whether or not our statute authorizes the defendant to set forth, in the same answer, several defences which are totally inconsistent in fact, so that proof of one would necessarily disprove the other.

II. I am not prepared to say that the court erred in its ruling that the defendant in error was not bound to accept the baggage at the time it was tendered in this case. If the allegation of the petition as to the delivery of the baggage to the carrier be true, then the plaintiff in error had failed and refused for more than a year to redeliver the property, had been called upon in the court below to answer as to its delinquency, and had answered by denying the receipt of the property. Six months after filing such answer, and while the same was still on file, the plaintiff in error tendered the baggage. The defendant in error was not bound to accept such tender.

If the baggage was never received for transportation by the plaintiff in error as a common carrier, then no injury was done by the ruling under consideration.

III. In case of injury to baggage or loss of it through the carrier's fault, the damages must be measured on the basis of the value of the baggage at the place of destination. DAMAGES: VALUE OF BAGGAGE AT PLACE OF DESTINATION. Sutherland on Damages, 291 and 237, and authorities there cited.

In such case the value of clothing carried as baggage is its value to the owner for use, and not merely what it could be sold for in money, but still such value must be taken at the place of destination: *Fairfax v. N. Y. C., etc., R. R. Co.*, 73 N. Y. 167.

It results that the court erred in permitting the defendant in error to prove the value of the property at Cheyenne, Wyoming.

For the errors above pointed out the judgment is reversed, and cause remanded for further proceedings in accordance with this opinion.

All the judges concurred.

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CLARK

v.

EASTERN R. R. Co.

(*Advance Case, Massachusetts. June 19, 1885.*)

A passenger arrived at a station in the evening, but left his baggage overnight in the baggage-room of the railroad depot. During the night the depot was burned and the baggage destroyed. In a suit against the railroad company to recover damages for the loss, *held*, that the company was a gratuitous bailee, and that failure to provide suitable store-room, with reference to safety from fire, and proper means for extinguishing fire, was not of itself such gross negligence as to make it liable for loss occurring from accidental fire.

ACTION of contract to recover damages alleged to have been caused by the destruction of the plaintiff's goods by a fire occurring at the station of the defendant at Salem, on the night of April 6-7, 1882. At the trial in the superior court it appeared that on fast-day, April 6, 1882, one Nicholson, a commercial traveller for the plaintiff's firm, came from Gloucester to Salem on the Eastern R. R., buying his tickets and checking his two trunks (containing hats, caps, and straw goods) at Gloucester. He arrived at Salem at about 6:10 P. M., and not finding the kind of conveyance necessary to carry the trunks to the hotel, they were left at the station and placed in the baggage-room. That night there was a fire in the baggage-room of the station. The plaintiff contended that the baggage-room in which his goods were placed was unsuitable and the contents in the room were of an inflammable character; and,

also, that the means provided for the extinguishment of a fire in such circumstances were grossly insufficient. At the close of the evidence in the case the court ruled that there was no evidence upon which the jury could find a verdict for the plaintiff, and directed them to return a verdict for the defendant. The plaintiff alleged exceptions to the ruling of the court.

*S. J. Thomas* for plaintiff.

*R. Olney & S. Butler* for defendant.

C. ALLEN, J.—The plaintiff's case rests on the proposition that the baggage-room provided by the defendant was not a suitable place for the storage of trunks with reference to safety from fire, and that the defendant did not provide proper means for extinguishing fires. Such omission is not of itself gross negligence for which a liability can be imposed on a gratuitous bailee to make good a loss happening from an accidental fire. The defendant, in point of fact, appears to have put the plaintiff's trunks in the only place it had for the purpose of keeping trunks, and certainly it was under no obligation to the plaintiff to provide a better place. In this view it is not necessary to consider the further proposition of the defendant, that since the plaintiff's property was put into the defendant's custody without its consent, and solely through the wrongful and fraudulent conduct of the plaintiff himself, all the consequences must be borne by him exclusively.

Exceptions overruled.

See next case and note.

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### HOEGER *et al.*

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. R. Co.

(*Advance Case, Wisconsin. April 28, 1885.*)

D, a travelling salesman in the employ of plaintiffs, applied to defendant's baggage agent at Red Wing on Saturday, March 1, 1884, to have three trunks checked to Hastings, which was done, and three checks delivered to D. The train reached Hastings that evening about 9 o'clock, the three trunks were put off there upon the platform, and were subsequently placed in the baggage-room of the depot. D did not stop at Hastings, but went on to Minneapolis. The next day he returned to Hastings, reaching there about 2 o'clock in the afternoon, and went to a hotel. He made no effort to get his trunks, although he could easily have done so had he desired. Monday morning about 3 o'clock they were consumed in a fire, not happening by any negligence of defendant or its employees, which destroyed the depot and its contents. The plaintiffs who owned the trunks brought suit against the company to recover for their destruction. *Held*, that at the time of the fire the

company held the trunks merely as a bailee for hire, or warehouseman, and that, the fire being accidental, it was not responsible for the loss of the baggage.

APPEAL from circuit court, Milwaukee county.

This is an action against the defendant, as a common carrier, for damages for the loss of goods burned up in the defendant's passenger depot at Hastings, Minnesota. The jury was waived, and the case was tried by the court, which found the facts as stipulated, and to the effect that during the times in question the plaintiffs were copartners and merchants, doing business at Milwaukee; that they sold goods by sample through travelling agents or salesmen at various towns and cities throughout Wisconsin, Minnesota, and other States; that on Saturday afternoon, March 1, 1884, one Dilg, travelling agent of the plaintiffs, applied to the defendant's baggage agent at Red Wing, Minnesota, to have three trunks, containing samples of the goods sold by him for the plaintiffs, checked in the usual and ordinary way in which baggage is checked for transportation, on a passenger train then about leaving Red Wing for Hastings; that at the time of such application Dilg presented to said baggage agent a railroad ticket or other evidence of his right to be carried as a passenger from Red Wing to Hastings on that train; that the baggage agent thereupon received said trunks for transportation, and placed them in the baggage car of said passenger train; in the usual and customary way in which ordinary baggage is placed in said car, with the knowledge of Dilg, and as evidence thereof then and there delivered to him three certain brass baggage checks, numbered respectively 42,015, 36,155, 42,595, of the usual form and size as are given to passengers with regular baggage, and the duplicates thereof were attached to said trunks respectively; that the trunks and their contents weighed more than 200 pounds; that under the rules and regulations of the defendant, Dilg was entitled to free passage for 200 pounds of baggage by virtue of his ticket as a passenger, and for the excess of that amount he was to pay the defendant, on the delivery of the trunks to him at the place of destination, the charge according to the then-established tariff rate for the carriage of excess baggage; that in pursuance of that agreement Dilg took passage on said train, and said trunks were safely carried in the baggage car on said train, on that same afternoon, from Red Wing to Hastings, where they arrived between 8 and 9 o'clock that evening; that upon such arrival the trunks were safely delivered from said baggage car onto the platform of the depot, and remained there a sufficient length of time for Dilg to have applied for and taken them away, and were ready for delivery to Dilg or any other person who should present said checks and pay the excess of baggage charges thereon, and were thereafter, according to the custom and practice of the defendant, placed in the baggage-room of the depot, and remained there in

good order and condition until about 3 o'clock the next Monday morning, when the depot building, together with the three trunks and contents, was destroyed by fire, not happening by any negligence of the defendant or its servants; that Dilg knew the trunks were on the train with him, and that, on the arrival of the train at Hastings, the trunks would be taken out of the car and placed on the depot platform, as stated; that Dilg did not stop off at Hastings, and made no arrangements with any of the defendant's agents as to the retention and storage of the trunks, but retained the checks and went to Minneapolis on the same train, as a matter of convenience to himself, without the knowledge of the defendant's baggage agent at Red Wing or at Hastings, or the person in charge of the trunks in the baggage car; that Dilg returned from Minneapolis to said depot at Hastings between 1 and 2 o'clock on Sunday afternoon, before the fire, and went directly to a hotel in Hastings and remained there, retaining the checks, until after the fire; that the usual and customary way in which Dilg removed said trunks from the depots to hotels was by either presenting or sending the baggage checks to the baggage agent of the defendant, and paying the excess baggage charges, and then having the trunks taken by an expressman or baggage-man, to the hotel which he might designate; that upon the arrival of said trains, respectively, at the depot at Hastings, there were expressmen or baggage-men present ready, willing, and prepared to carry any sample cases from the depot to the hotel, or to any other place in Hastings; that if Dilg had, on the arrival of either of said trains, presented the checks and paid such excess charges to the defendant's baggage agent there, or had some express or baggage man do the same, the trunks would thereupon have been delivered to the plaintiffs, or such express or baggage man for him; that the value of the plaintiffs' goods so burned was \$604, which the plaintiffs were entitled to recover, if anything. As conclusions of law, the court found, in effect, that the plaintiffs were not entitled to recover anything, upon the facts stated, and that judgment be entered in favor of the defendant and against the plaintiffs, dismissing their complaint, with costs to be taxed. From the judgment entered thereon the plaintiffs bring this appeal.

*Johnston, Rietbrock & Halsey* for appellants.

*J. W. Cary, D. S. Wegg and Burton Hanson* for respondent.

CASSODAY, J.—Which party must suffer the loss of the trunks and their contents, upon the facts stated? The counsel for the plaintiffs frankly concedes that if the trunks and their contents are to be regarded as baggage, and the stringency of the defendant's liability, after the trunks arrived at Hastings, is to be no greater than in the case of ordinary baggage, then that there can be no recovery. With equal frankness the counsel for the

QUESTION STAT.  
ED.

defendant concedes that if the trunks and their contents are to be regarded as freight, and the stringency of the defendant's liability, after the trunks arrived at Hastings, is to be the same as in the cases of ordinary freight, then that the defendant is liable. The learned counsel on both sides assert that there is no reported case involving the precise question here presented. With faith in the fidelity of their research, and a clear conviction as to what the law in such cases ought to be, and, as we think, is, we have made no attempt to examine through the multitude of cases bearing upon the question in verification of their assertion. Had the defendant failed to deliver the trunks at the depot in Hastings, and they had been destroyed in transit, or carried elsewhere and lost, then the defendant might have been liable for their value as a common carrier.

Dilig having engaged the defendant to transport the trunks as his baggage, and the defendant, knowing their contents, having received and checked them as his baggage, and Dilg and the trunks having been carried from Red Wing to Hastings on the same passenger train, we must, under the facts stipulated and found, hold that both parties were, by their contract, conclusively estopped from claiming that the trunks were not to be carried as baggage, or that they were not to be received, treated, and cared for on their arrival at Hastings as baggage, and not as ordinary freight. In one portion of the opinion in the recent case of *Texas, etc., R. R. Co. v. Capps*, 16 Am. & Eng. R. R. Cas. 118, not cited by counsel, this proposition is asserted so far as estopping the railroad company. But it is well established that estoppels, to be binding, must be mutual. Under that contract the defendant was bound to safely carry the trunks and their contents to the passenger depot at Hastings, and there place them upon the platform or other customary place of delivery, and keep them there for a sufficiently reasonable length of time for the duplicate checks to be presented and the trunks claimed. *Pat-scheider v. Railway Co.*, L. R. 3 Exch. Div. 153; *Dinny v. Railroad Co.*, 49 N. Y. 546; *Onimit v. Henshaw*, 35 Vt. 605; *Hutch. Carr.*, §§ 707 to 710; *Thomp. Carr.*, notes, p. 534, § 22. It stands confessed that this duty of the defendant was fully performed. Being performed, its duty as a common carrier of baggage ended, and its duty as a bailee for hire or a warehouseman began. *Hutch. Carr.*, §§ 707 to 710; *Thomp. Carr.*, notes, pp. 534, 535, § 23; *Roth v. Railroad Co.*, 34 N. Y. 548; *Railroad Co. v. Mahon*, 8 Bush, 184; *Railroad Co. v. Boyce*, 73 Ill. 510; *Texas, etc., R. R. Co. v. Capps*, *supra*. That duty required the defendant to then place the trunks in a proper and suitable baggage-room, and then exercise ordinary care and diligence in safely keeping them there. These things were done. The destruction by fire being without the fault or negligence of the defendant, there was no liability.

The judgment of the circuit court is affirmed.

BAGGAGE. WHEN  
CARRIER BE-  
COMES A WARE-  
HOUSEMAN.

**Baggage—When Railroad Company's Liability as Common Carrier ceases.**—A railway company's liability as common carrier as to baggage carried by it, continues until baggage has arrived at the place to which it is checked, and a reasonable time has elapsed for it to be removed. *Mote v. Chicago, etc., R. R. Co.*, 27 Iowa, 22; *Louisville, etc., R. R. Co. v. Mahan*, 8 Bush (Ky.), 184; *Ross v. Missouri, etc., R. R. Co.*, 4 Mo. App. 582; *Dinny v. New York, etc., R. R. Co.*, 49 N. Y. 546; *Jones v. Norwich & New York Transp. Co.*, 50 Barb. (N. Y.) 193; *Burnell v. New York Cent. R. R. Co.*, 45 N. Y. 184; *Patscheider v. Great Western Ry. Co.*, L. R. 3 Ex. Div. 153.

**Illinois Rule.**—In Illinois it is held that the railroad's duty as common carrier does not cease until, not only a reasonable time has elapsed for the removal of the baggage, but until the railroad company has actually stored the baggage in a safe place. Thus, in *Chicago, etc., R. R. Co. v. Fairclough*, 53 Ill. 106, the court say: "If the owner of the baggage fails to call for it on the arrival of the train, it is the duty of the company to deposit it in their baggage-room, in which event, as in the case of freight, their responsibility becomes that of warehousemen." Again, in *Bartholomew v. St. Louis, etc., R. R. Co.*, 53 Ill. 227, the court say: "When defendants in error, therefore, transported the trunk to Delhi, to relieve themselves from the liability as common carriers, they should have stored the trunk in a safe and secure warehouse, and then the new relation of warehouseman would have attached. But the burden of proof is upon the common carrier to show that the property was stored in a safe and secure warehouse, and until this appears the company cannot be exonerated from the liability of a common carrier." Again, in *Chicago, etc., R. R. Co. v. Boyce*, 73 Ill. 510, the court say: "The rule, as stated by text-writers, is that the responsibility continues until the owner has had reasonable time and opportunity to come and take away his baggage. If it be not called for within such reasonable time, the company may store it in a secure warehouse, and from thence its liability as a carrier ceases and that of a warehouseman is assumed."

If the rule stated by the Illinois court is correct, a carrier would be liable where, after the baggage had been received at the station and a reasonable time had elapsed for its removal, it was destroyed by an accidental fire, unless it had been stored in a safe place before its destruction. The soundness of this rule may be questioned. Its origin is explained in the case of *Bartholomew v. St. Louis, etc., R. R. Co.*, 53 Ill. 227, where the court say: "It was held in the cases of *Richards v. Michigan Southern, etc., R. R. Co.*, 20 Ill. 404, and *Porter v. Chicago, etc., R. R. Co.*, 20 Ill. 407, that when a railroad transports goods and they reach their destination, the liability of the company ceases, as common carriers, when they are unloaded, and placed safely and securely in their warehouse, under the charge of competent and careful servants, ready to be delivered, and the liability of warehouseman for hire attaches. In *Chicago, etc., R. R. Co. v. Scott*, 42 Ill. 132, it was said that to change the relation or duty of the company from that of a common carrier to that of a warehouseman, the warehouse must be a safe and secure place in which the goods are stored. These cases all related to freight in its ordinary sense, as distinguished from baggage which is usually taken with and attends persons travelling. But no difference is perceived between baggage given in charge of the company and ordinary freight. . . .

The Illinois court applies to the case of baggage the rule prevailing in that State as to the termination of a common carrier's liability for freight, i. e., that it terminates as soon as the freight has been received and safely stored, and that it does not continue until notice to consignee and a reasonable time to remove has been given. It is to be noticed, in the first place, that the court do not follow the rule in regard to freight in one respect. In regard to freight the rule is that the railroad may put an end to its common carrier's liability by storing the goods as soon as they are received; its liability is not continued



until a reasonable time for removal has elapsed. While, in regard to baggage, it seems that the common carrier's liability does continue until such reasonable time has elapsed. But there is, in reality, no analogy between the cases of freight and baggage, and no reason for applying the rule in regard to delivery of freight, to baggage. In the case of freight, the consignee has no means of knowing when goods consigned to him have arrived; and there is a conflict of authority as to whether the railroad company undertakes as a common carrier to notify the consignee of the arrival of goods and to hold them a reasonable time for delivery, or whether it contracts as common carrier to carry the goods to their place of destination and to store them safely at that place until called for. The Illinois court adopt the latter rule. It is evident that this rule relates to notice to the person who is to receive the goods; but in the case of baggage this question of notice is not involved, since the person checking the baggage, in general, travels with it on the same train. "The question is as to liability for baggage, not freight . . . and there is no question of notice, or the necessity of notice, on the part of the defendant, in the case." *Jones v. Norwich & New York Transp. Co.*, 50 Barb. (N. Y.) 194, 206. Again, the passenger and his baggage arriving on the same train, it is generally possible for him to remove his baggage at once or very soon after its arrival. It is in the contemplation of the parties that baggage shall be removed soon after its arrival, but that if it is not, it shall be safely stored. Hence, it would seem that a very different rule should govern the case of baggage from that applied to the case of freight. It would seem that the contract to be implied on the part of the railroad company from receiving and checking baggage was, as stated in the New York cases above cited, to carry the baggage to the place to which it is checked and to hold it in readiness a reasonable time for its removal, after which the company's liability as common carrier ceases and it becomes liable merely as warehouseman or bailee.

**Reasonable Time for Removal of Baggage Different from that for the Removal of Freight.**—The passenger and his baggage arriving at the same time, so that he can in general remove his baggage shortly after its arrival, it is held that a "reasonable time" for its removal is not the same as that to be allowed for the removal of freight. *Hutch. Carr.*, § 708; *Roth v. Buffalo, etc., R. R. Co.*, 34 N. Y. 548; *Quimit v. Henshaw*, 35 Vt. 605.

**Cases where it was Decided that a Reasonable Time for Removal had Elapsed.**—What is a reasonable time for removal of baggage and when it has elapsed are mixed questions of law and fact, to be decided by the jury on instructions from the court, on the facts and circumstances of each case. *Mote v. Chicago, etc., R. R. Co.*, 27 Iowa, 22; *Louisville, etc., R. R. Co. v. Mahan*, 8 Bush (Ky.), 184.

In the following cases it was held that a reasonable time had elapsed for the removal of baggage, and that consequently the company's liability as common carrier had come to an end. In *Roth v. Buffalo, etc., R. R. Co.*, 34 N. Y. 548, the passenger arrived at his destination at 10 o'clock at night and went to a hotel without inquiring for or demanding his trunks, and during the night the trunks were accidentally destroyed by fire, it was held that the company was not liable.

In *Jones v. Norwich and New York Transp. Co.*, 50 Barb. (N. Y.) 198, the passenger arrived on the steamer at about 1 o'clock Sunday morning, she remained in her state-room until 8 or 9 o'clock in the morning, when she left the boat, without presenting her checks or giving notice that she intended to leave. Early Sunday morning the trunks were placed in a warehouse which, with its contents, was totally destroyed by an accidental fire Sunday afternoon. It was held that a reasonable time for their removal had elapsed and that the company was not liable, the fire being accidental; and that the fact that the day of passenger's arrival was Sunday, on which day the statute law

prohibited the doing of any secular work and all travel, furnished her no excuse for her delay.

In Chicago, etc., R. R. Co. v. Boyce, 73 Ill. 510, the passenger stopped over before reaching his destination. His trunks arrived there Oct. 7th, and were at once stored in company's warehouse, where they were destroyed on Oct. 8th by an accidental fire, which consumed the warehouse and its contents. It was held that a reasonable time for removal had elapsed, and that the company was not liable for the loss of the trunks. In this case it was argued that, since the passenger had "stopped over," as he was authorized to do by the custom of the road, the reasonable time for removal did not begin to run until passenger had arrived at his destination, which in this case was not till after the destruction of the trunks. But the court held that the reasonable time for removal, meant a reasonable time after the arrival of the trunks.

**Railroad's Liability as Warehouseman for Baggage.**—After a reasonable time for the removal of baggage has elapsed, the railroad's responsibility in regard to baggage is not at an end. It then becomes liable as a warehouseman or bailee for the safe-keeping of the baggage. Roth v. Buffalo, etc., R. R. Co., 34 N. Y. 548; Redfield Railways, § 171; Hutchinson on Carriers, § 712; Mote v. Chicago, etc., R. R. Co., 27 Iowa, 22; Mattison v. New York Cent. R. R. Co., 57 N. Y. 552; Burnell v. New York Cent. R. R. Co., 45 N. Y. 184.

In Illinois the railroad's liability as warehouseman does not begin until the baggage is safely stored. Bartholomew v. St. Louis, etc., R. R. Co., 53 Ill. 227; Chicago, etc., R. R. Co. v. Fairclough, 52 Ill. 106; Chicago, etc., R. R. Co. v. Boyce, 73 Ill. 510. See *supra*.

**Where the Fault of the Railroad Company or its Servants contributes to the Delay in removing Baggage.**—The plaintiff's wife arrived at the station about half-past five in the evening, and, before she had time to get her trunk, the baggage-master locked it up in the depot and went to tea. She looked about the depot for some one to get her trunk for her, and, finding no one, went away. The plaintiff sent his son to get the trunk; he procured a man with a horse and wagon to carry it, and about 8 o'clock that evening they went to the depot. They found it locked, and the son thereupon went to the residence of the baggage-master and induced him to go to the depot and deliver the trunk. Upon their arrival the baggage-master got the trunk, took off the duplicate check, and drew the trunk out of the depot door. It then transpired that the man with the wagon had become impatient and gone off. No other conveyance could be obtained, and the baggage-master consented to keep the trunk till morning. It was placed back and locked up. The depot was entered that night by burglars, the trunk broken open and rifled of its contents. It was held that, as the omission to procure the trunk in the evening was owing to the negligence of defendant's servant, the company's common carrier's liability had not determined at the time of the burglary and that it was consequently liable for the loss. It was also held that the taking off the check and the partial delivery to the plaintiff's son, under the impression by him that the horse and wagon were still there, was not a delivery. Dininny v. New York, etc., R. R. Co., 49 N. Y. 546.

**Theory of Railroad Company's Liability as Warehouseman.**—It was held in Burnell v. New York Cent. R. R. Co., 45 N. Y. 184, that the carrier's liability for the safe storage of baggage after a reasonable time for removal had elapsed, was based on the contract for carriage, and was not a duty imposed independent of such contract. In that case the plaintiff had contracted with defendants for carriage from Palmyra to New York City. By special arrangement between defendant and the Hudson River R. R. Co., passengers for New York City were transported from Albany, the terminus of defendants' road, to New York City. The plaintiff and his baggage reached the depot of the Hudson River R. R. in New York City at the

same time, and the baggage not being called for within a reasonable time, it was stored in the depot of the Hudson River R. R. Co., whence it was stolen or misdelivered through the negligence of the servants of that company. It seems to have been argued that the duty of storage was not included in the plaintiff's contract of carriage; that that contract merely provided for a common carrier's liability on the part of defendants until a reasonable time for removal had elapsed, and that after that time the duty of storing devolved upon the last carrier, as having actual possession of the baggage; that, therefore, the Hudson River R. R. Co., not the defendant, the New York Central R. R. Co., was liable for the loss of the trunks. It was held, however, that the defendants' contract covered the storage of the trunks after a reasonable time for removal had elapsed, and that the carrier was not transformed, after the expiration of the "reasonable time," into a mere accidental finder or gratuitous bailee.

**Extent of Railroad's Liability as Warehouseman.**—In the case last referred to, it was held that the liability of a railroad company as warehouseman was a part of the contract for carriage. If so, its liability would be that of a bailee for hire. It is stated in *Clark v. Eastern R. R. Co.*, reported in this number of *Am. & Eng. R. R. Cas.*, that it was merely that of a gratuitous bailee.

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## INTERNATIONAL AND GREAT NORTHERN R. R. Co.

v.

HASSELL.

(62 Tex. 256.)

A passenger who takes passage on a through train with notice that under the regulations of the company the train will not stop at a designated intermediate point, cannot require the train to stop at such point to enable him to get off there. If, in ignorance of such regulation, he takes passage on a through train, with a ticket to a station at which the train will not stop, the company has a right to correct his mistake at any regular stopping station for that train before reaching the station desired; and if, being informed of his mistake, after being afforded an opportunity to quit the train at a regular stopping station and wait for the proper train, he refuses to do so, the conductor of the train may put him off in a proper manner.

Evidence of general notoriety at a designated place of the customs of a railway company in running its trains, is not admissible against one who does not live at that place, and is not shown to have had the means of acquiring such general knowledge as may be possessed by residents of the place.

One who receives injury in jumping from a moving railway train, and who jumps therefrom because ordered or directed so to do by a conductor who is ejecting him, cannot be charged with contributory negligence.

**APPEAL from Anderson.** Tried below before the Hon. Peyton Edwards.

Suit by C. R. Hassell against the International and Great Northern R. R. Co. for damages for personal injuries received in being wrongfully ejected from a passenger train, near Palestine. The appellant set up as a defence that it was not guilty as charged;

that appellee was wrongfully on the train, and that he contributed to or caused the injury received. The case was tried on the 3d day of December, 1883, and resulted in a verdict and judgment for appellee for \$600.

The important facts are stated in the opinion.

*John Young Gooch* for appellant.

*Word & Glenn* for appellee.

STAYTON, J.—In so far as it was necessary to do so, the charge of  
FACTS. the court below clearly informed the jury as to the rights of the respective parties on each ground of action embraced in the petition.

One ground of action was the failure of the appellant to carry the appellee from Jacksonville to Elkhart on the train on which he started from the former place.

The other ground of action was that the conductor ejected the appellee from the train on which he left Jacksonville, in an improper manner, from which he alleged injury.

Under the uncontroverted facts presented by the record it does not become necessary to determine whether the contract made between the appellee and the person who was acting as ticket agent in the appellant's office at Jacksonville was binding on the appellant or not. To that person the cost of passage to Elkhart was paid, and the appellee received in good faith a ticket from him, which on its face was good, and entitled him to be carried from Jacksonville to Elkhart. After paying for and receiving a ticket bearing the signature of the proper officer of the company, in good faith he entered the car of the appellant, believing, as he had been told by the person who sold him the ticket, that on that train he could go to Elkhart.

After he entered the train and the journey began, the conductor recognized the validity of the ticket which he held, by receiving it as an evidence that the holder of it was entitled to and had commenced a journey paid for and evidenced by it. These facts made the appellee a passenger on the appellant's train, and not a mere intruder or trespasser. Such would have been his character if he had held no ticket at all, if he entered the car of the appellant in good faith intending to make the journey and to pay his passage.

The court instructed the jury, among other matters, as follows:

REGULATION AS  
TO STOPPING  
TRAINS AT WAY  
STATIONS.

"The proof shows that the railroad company runs two daily trains between points named in plaintiff's ticket, and the regulation that one of these trains shall not stop at all stations is a reasonable regulation and one they had a right to make, and a passenger who travels on said road with notice of such regulation cannot get on a through train and demand to be carried to a point at which said through train does not stop, even if he has a ticket to such point, unless he goes on the train by direc-

tion of the railroad's agents. If the person who acted as agent, and sold the ticket, directed the plaintiff to get on the through train, he had the right to get on said train and travel upon it; but if, after getting on, he was, at a regular station, notified that the train would not stop at Elkhart, it was his duty then to get off and take the proper train; for if the railroad agent at Jacksonville made a mistake, the railroad had a right to correct the mistake at any regular stopping station for that train. If, then, he was informed at Palestine of the mistake, it was his duty to get off, and if he did not do so, the conductor had a right to put him off in a proper manner."

EJECTING PAS-  
SENGER FROM  
THROUGH TRAIN.

There was no question made as to the right of appellee to a passage on the other train, from Jacksonville to Elkhart, on the ticket which he held,—that right was recognized.

Under the facts of the case we believe that the charge of the court correctly presented the law of the case; and that in so far as it made the right of the appellee, in any respect, to depend upon the act of the person who was in the ticket office of appellant, assuming to discharge the duties of its agent, and from whom he purchased the ticket on which he was travelling, even if incorrect, could not have prejudiced the appellant; for the uncontroverted facts showed that the appellee was informed at Palestine that the train on which he was, under the regulations of the road, would not stop at Elkhart, and that the following train would, and that he was requested to wait for that train.

The jury was also fairly instructed, under such a state of facts, that it was not thereafter wrongful to eject the appellee from the train, if this was done in a proper manner.

The other parts of the charge carefully presented to the jury the right of the appellee under his several causes of action, and unless the jury disregarded the charge, which cannot be presumed, they could not have embraced in their verdict damage for failure to transport the appellee to Elkhart on the train which he boarded at Jacksonville.

There is no evidence that the appellee had notice at the time he boarded the train at Jacksonville that it would not stop at Elkhart, and the court correctly ruled that evidence that such fact was generally known at Jacksonville was not admissible to show notice to the appellee, who did not live at Jacksonville, and who was not shown to have had the means of acquiring such knowledge as may have been generally in the possession of those who did live there.

The right of the appellee to recover damage which may have resulted from his ejection from the car was clearly presented to the jury by the charge of the court, which informed the jury, after having correctly instructed them as to the right of the appellant to eject the appellee in a proper manner, "if the ejection was by the use of unnecessary force, or he was injured in getting off by the

carelessness of the conductor, without any fault of his own, then you will give him such damages as will compensate the injuries he received in getting off or being forced off, not to exceed \$2,000."

There is a direct conflict in the evidence of the conductor and the appellee in reference to the manner in which he was put off of the train.

The conductor stated that after conducting the appellee to the steps of the car, the appellee was about to leap from the car while still moving slowly, and that he told him not to jump, that the train would stop, and that, disregarding this instruction, the appellee leaped from the train while moving slowly.

The appellee, however, stated that while the train was moving slowly the conductor said to him, "now is your time, jump," and that he did so, from which resulted the injuries of which he complained.

Under such a state of facts a judgment cannot be reversed on the ground that the verdict was contrary to the evidence, unless it be the law that one who leaps from a moving train, when instructed to do so by the conductor, as matter of law may be charged with contributory negligence.

We do not so understand the law to be. *Kline v. C. P. R. R. Co.*, 37 Cal. 400; *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 268; *Wharton on Negligence*, 369, 371; *Shearman & Redfield on Negligence*, 282, 283.

It was for the jury to determine whether or not, under the facts existing at the time, the appellee used that care which a prudent man under like surroundings would use.

It is true that the appellee stated that he thought the leap dangerous, but, even though this was true, if the alternative of jumping from the car while in motion, or of being ejected from the car while in motion, was presented to him, it cannot be claimed as a matter of law that his election was not that most likely to be attended with the least danger, nor that thus electing and leaping from the car was negligence *per se*; in reference to this matter the court instructed the jury as follows:

"The plaintiff Hassell must be himself not to blame in jumping from the train while in motion of his own accord; and to recover for being injured in jumping from the train while in motion it must appear that he used ordinary care himself in not jumping until he was forced to do so by the conductor, or after some act by the conductor showing an immediate intention of ejecting him forcibly."

There was evidence tending to show that it was the intention of the conductor forcibly to eject the appellee from the cars at the time he leaped, and there was evidence directly to the contrary; upon this evidence the jury found in favor of the appellee, which includes a finding that he exercised due care, and we cannot say

that the finding is so manifestly against the evidence as to authorize this court to set it aside.

There is no error found for which the judgment should be reversed, and it is affirmed.

Affirmed.

Beauchamp v. International, etc., R. R., 9 Am. & Eng. R. R. Cas. 315.

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PLATT

v.

CHICAGO AND NORTHWESTERN R. R. Co. *et al.*

(*Advance Case, Wisconsin. April 28, 1885.*)

Where a passenger has taken passage on a train which does not regularly or ordinarily stop at his place of destination, the railroad is not, in the absence of any special contract, bound to stop the train at that place. Its duty toward such passenger is fully satisfied by notifying him in due time that the train will not stop, and giving him an opportunity to alight at some other station on the road, from which he can take passage on the first train of the company which regularly stops at the station named in passenger's ticket.

It is the duty of a passenger to inform himself whether a train on which he proposes to take passage will stop at the station to which he is bound.

APPEAL from circuit court, Juneau county.

*Lusk & Perry* for respondent.

*J. G. Jenkins* and *S. L. Perrin* for appellants.

TAYLOR, J.—The respondent brought her action in the circuit court to recover damages from the appellant companies <sup>FACTS.</sup> for not carrying her directly, and upon the same train, from St. Paul to Woneewoc. The evidence shows that the plaintiff, in the forenoon of the fourteenth day of August, 1883, purchased a ticket at the Union depot in St. Paul, to be carried over the railroads of the appellants from St. Paul in Minnesota, to Woneewoc, in this State. After purchasing the ticket the plaintiff asked the ticket agent "what time the train would leave, and he told her at 12:45," and when that train was called she took that train. She came to St. Paul in the morning and waited all the time in the Union depot until the train left at 12:45. She was carried by this train from St. Paul to Elroy, which is the junction of the lines of the two railway companies. After the train arrived at this place, between 9 and 11 o'clock in the evening, one of the train-men came into the car where the plaintiff was, and asked plaintiff how far she was going. She told him she was going to Woneewoc. He replied: "We don't stop at Woneewoc; you will have to get off

here." She sat a short time, and then she asked the train-man if he would not stop long enough for her to step off; that she would be at the door. He replied: "No; if you do not get off here, you will have to go to Reedsburg." "I did not show him my ticket." And thereupon the plaintiff got off the train, and remained at Elroy until the arrival of the next train, about 10 o'clock in the morning, when she got on board, and was carried to Wonewoc, which is about eight miles from Elroy. Plaintiff was acquainted in Elroy, and stopped at a hotel, where she had stopped at other times, during the night. The plaintiff recovered a judgment against the appellants for \$500 damages, and the appeal is from that judgment.

The plaintiff's right to recover in this action depends upon the question whether the companies were bound to carry her to her destination at Wonewoc on the same train which carried her from St. Paul to Elroy. If they were, then she would be entitled to recover such damages as she sustained by being compelled to leave the train at Elroy, and remain there until the next train in the morning, which carried her to her destination. If they were not so bound, then she would not be entitled to recover any sum against either company.

The admissions in the pleadings and the evidence show that the two companies run passenger trains from Chicago to St. Paul both ways, the Omaha R. R. Co. running two trains daily each way between St. Paul and Chicago, and the Northwestern R. R. Co. running four passenger trains daily each way between Elroy and Chicago, passing Wonewoc; and that two of the trains each way between Elroy and Chicago stopped at all the stations, including Wonewoc, to discharge and receive passengers; and two of the trains, which were for the accommodation of through travel between Chicago and St. Paul, stopped only at the larger towns; that Wonewoc was not one of the regular stopping places for these through trains; and that the train upon which the plaintiff came from St. Paul to Elroy was one of the through trains for which Wonewoc was not a regular stopping place.

The jury, in their special verdict, find, among other things, (1) "that the train which carried the plaintiff from St. Paul to Elroy did not ordinarily stop at Wonewoc;" and (2) "that it did sometimes stop at Wonewoc for the purpose of letting off passengers." Although the court excluded evidence offered by the defendants to show that this train, according to the regulations of the company, was not to stop at Wonewoc, yet a witness on the part of the plaintiff testified that he had seen the folders which the company issues, and thinks that Wonewoc was not mentioned as a stopping place for that train. This evidence, together with the evidence of the plaintiff herself, that she was informed at Elroy, by an employee of the company, that the train did not stop at Wonewoc, and the



finding of the jury that the train did not ordinarily stop there, in the absence of any express contract on the part of the companies that the plaintiff should be carried from St. Paul to Wonevoo by the same train upon which she took passage at St. Paul, leaves the plaintiff in the situation of every other person who buys a ticket for passage over the roads of defendants. In the absence of any express contract to the contrary, the holder of the ticket is to be carried over the road, according to the reasonable rules and regulations of the company; and the company cannot be compelled to stop and discharge a passenger at a place on the road, when, by its reasonable rules and regulations, the train upon which the passenger is, does not stop there. The only duty of the companies in such case is to inform the passenger in due time of the fact that the train upon which he is then being carried, does not stop at the place to which he has purchased a ticket, and permit the passenger to leave such train, at some other station on the road, from which the passenger can take passage on the first train of the company which will, according to its rules and regulations, stop at the station mentioned in the passage ticket.

TICKET - HOLD-  
ER'S RIGHTS AS  
TO STOPPING AT  
STATION

As stated above, the plaintiff's right to recover anything in this action depends upon the contract made between her and the companies at the time she purchased her ticket at St. Paul.

ARE GOVERNED  
BY CONTRACT.

By the purchase of that ticket she obtained an undoubted right to be transported over the roads of the companies from St. Paul to Wonevoo, on the first or any subsequent train which left the depot at St. Paul, and which, by the regulations of the company, was accustomed to stop at Wonevoo to discharge passengers; or she might, if she saw fit, ride upon a train starting from St. Paul towards her destination, which did not, by the rules of the company, stop at Wonevoo; but she could not, by taking passage on such train, render it obligatory upon the company to stop at Wonevoo to permit her to leave the train there. In such case, the duty of the company would be fully discharged when it informed her that the train would not stop at such station, and permitted her to leave the train at some station before arriving at that place.

The evidence in this case does not show that the plaintiff was misled by any act on the part of the companies which caused her to believe that the train she took passage on at St. Paul would carry her directly to Wonevoo. She made no inquiries on the subject. After purchasing her ticket, she simply asked the ticket agent when the train would leave, and he told her at 12:45. She took that train without making any inquiry as to whether it would stop at Wonevoo; and it is quite evident that she would have taken the same train she did had she known that it would not stop at that place. By taking it, she would reach her destination at the same time she would had she waited for the next train, which,

according to the rules of the companies, stopped at Wonewoc. The train she took carried her with more speed and more comfortably than the train which stopped at Wonewoc would have done, had she waited for it. If the company was not bound to carry her to Wonewoc on the train she started from St. Paul on, certainly she was not injured by being carried on that train to within a few miles of her destination, so far as appears from the evidence in this case.

That the regulation of the companies, in requiring the two through trains not to stop at Wonewoc and other small places on the line of their road south of Elroy, was a reasonable one, cannot, we think, be questioned. There were two other passenger trains running both ways daily, over the line of the Northwestern road south of Elroy, which stopped at Wonewoc, besides other mixed or accommodation trains, and it seems to us that was furnishing reasonable accommodation for persons travelling to and from the smaller towns on the line of the road. That regulations of the kind made by the defendant companies are reasonable and should be upheld by the courts is fully established by the authorities. *Railroad Co. v. Randolph*, 53 Ill. 570; *Railroad Co. v. Nuzum*, 50 Ind. 141; *Railroad Co. v. Applewhite*, 52 Ind. 540; *Railroad Co. v. Hatton*, 60 Ind. 12; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 432; *Johnson v. Railroad Co.*, 46 N. H. 213; *Cheney v. Railroad Co.*, 11 Metc. 121; *Railroad Co. v. Proctor*, 1 Allen, 267; *Fink v. Railroad Co.*, 4 Lans. 147; *Railroad Co. v. Bartram*, 11 Ohio St. 457; *Yorton v. Railroad Co.*, 54 Wis. 234; s. c., 6 Am. & Eng. R. R. Cas. 322. The rule is clearly and briefly expressed by the court in *Railroad Co. v. Randolph*, *supra*: "By his ticket a passenger acquires only the right to be carried according to the custom of the road; he has the right to go to the place for which his ticket calls on any train that usually carries passengers to that place, but he cannot insist on being carried out of the customary course of the road."

It is also held that it is the duty of the passenger to ascertain for himself whether the train, upon which he takes passage, will carry him, and put him off at the destination to which he wishes to be carried. See cases above cited. Some of the cases hold that "it is the duty of the conductor to run the trains according to public arrangements, and he has no power to change them, and a passenger has no right to infer that a conductor has any such power from his general duties as a conductor, and no reason to suppose that he can bind the railroad company by any such agreement." *Railroad Co. v. Hatton*, and *Railroad Co. v. Applewhite*, *supra*.

In order to entitle the plaintiff to recover damages in this action, it was incumbent on her to prove that she had, either by express contract with some employee or agent of the companies, authorized

REGULATION  
THAT THROUGH  
TRAINS WILL NOT  
STOP AT WAY  
STATIONS IS REA-  
SONABLE.

DUTY OF PAS-  
SENGER TO AS-  
CERTAIN WHERE  
TRAIN STOPS.

to make the same, or according to the rules and regulations of the companies, the right to be carried from St. Paul to Wonewoc on the same train on which she took passage at St. Paul. This, we think, she failed to prove upon the trial. The jury have found that the train on which she took passage did not ordinarily stop at Wonewoc, and the proof given on the trial that it had before that time occasionally stopped there to permit passengers to leave the cars there, did not estop the company from running its train in the ordinary way, and make it its duty to stop on this occasion; and as there was no proof tending to show that the ticket agent, or any other agent of the company, had either agreed with the plaintiff that it would stop there, or done anything which can be reasonably construed into an implied agreement to carry her to that place on that train, she failed to establish a cause of action against either of the companies. We are of the opinion that neither the evidence nor the finding of fact by the jury entitle the plaintiff to recover.

We need not, therefore, consider the other questions discussed by the learned counsel for the respective parties in reference to the damages to which the plaintiff would have been entitled in case she had established a right to recover at all. We are, however, constrained to state that, judging from the evidence preserved in the record, the verdict for \$500 was out of any just proportion to the damages sustained by the plaintiff by the delay at Elroy, had it appeared that such delay was caused by the mistake of the agents of the companies.

The judgment of the circuit court is reversed, and the cause is remanded to the circuit court, with instructions to enter judgment upon the special verdict in favor of the defendants.

**Duty of the Railroad Company to a Passenger who has taken Passage on a train that does not stop at the station named in his ticket—see notes to the cases of *Beauchamp v. International, etc.*, R. R. Co., 9 Am. & Eng. R. R. Cas. 314; *Trotlinger v. East Tennessee, etc.*, R. R. Co., 18 Am. & Eng. R. R. Cas. 52; and *St. Louis, etc.*, R. R. Co. *v. Marshall*, 18 Am. & Eng. R. R. Cas. 253.**

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## INTERNATIONAL AND GREAT NORTHERN R. R. Co.

v.

TERRY.

(62 *Texas Reports*, 380.)

Where the railway company has violated its contract with a passenger by carrying him beyond his destination, it is responsible in damages for the discomfort, inconvenience, sickness, expenses, and charges shown to have been the direct, natural, and proximate result of the breach of the contract.

Proof as to the symptoms of disease which afflicted plaintiff, by one of two physicians attending, is admissible when the absence of the other is satisfactorily accounted for.

APPEAL from Milam. Tried below before the Hon. W. E. Collard.

The appellee brought this suit in the district court of Milam county, alleging that he attained his majority on the 27th day of August, 1881, and that before that time he labored under the disability of minority, to recover of the appellant's railway company damages for the violation of his rights as a passenger on one of its freight trains, and upon which plaintiff had paid his fare from Rockdale to the depot of Milano Junction, by wrongfully carrying him beyond his destination a distance of three miles to a water tank, without his consent, and requiring him to leave the cars in the darkness of the early morning, about daylight, in bad, inclement weather, causing great physical and mental pain and discomfort; and after daylight to return through such inclement weather to Milano Junction without covering or protection, thereby causing plaintiff to contract disease, to his actual compensatory damage in the sum of \$10,000.

Defendant answered by exceptions, statute of limitations of one year, contributory negligence and general denial.

The demurrer of defendant being sustained by the court, the plaintiff filed a trial amendment, setting up that, by reason of the wrongful acts of defendant in compelling plaintiff to leave the cars in bad and inclement weather, he contracted pneumonia, was confined to his bed after reaching home about ten days, suffered great pain, and was detained from his business for a long time, put to great expense in physicians' and drug bills in the necessary treatment of the disease, to his damage as alleged in his first amended petition.

The verdict was for the plaintiff for \$500 damages.

The defendant made a motion for a new trial, which was overruled.

The court charged the jury on the subject of damages as follows:

"If you further find that plaintiff was required to get off the cars in rainy, cold or inclement weather, and defendant's conductor refused to carry plaintiff on to a regular station without further pay as consideration therefor, and if you further find that such acts on the part of defendant's servants and agents under the circumstances constituted negligence on their part, then you will find for plaintiff such actual damages as the evidence shows will be a fair and reasonable compensation to him for the inconvenience, loss of time, expenses, and personal injury occasioned directly and proximately by such negligence, and no more.

"If defendant was guilty of negligence to plaintiff's damage, and plaintiff was also guilty of negligence which contributed to the

injury or damage, defendant would not be liable for such damage or injury unless it has been shown that the negligence of defendant's servant was the direct and proximate cause of the damage; nor would plaintiff be entitled to recover for injury or special damage on account of defendant's negligence if he could have avoided the consequences of such negligence by the exercise of reasonable care and prudence on his part, that is, such care and prudence as an ordinarily careful and intelligent person would have used under the circumstances. But if defendant negligently carried plaintiff beyond his destination, and the station passed was a regular station where they received and discharged passengers, or if it was a junction of two roads in operation, and if defendant required plaintiff to get off the train at the tank, after he had paid his fare to the station passed, then he would be entitled to recover some damages, even though he has not shown any special damages resulting to him from the negligence of defendant, as the proximate cause. Yet if you find from the evidence that defendant was guilty of negligence, and carried plaintiff beyond his destination, after he had paid his fare, and the conductor required him to get off at the tank, not a usual stopping place to discharge passengers, and if you find that the plaintiff voluntarily exposed himself to inclement weather, which caused him to be sick, when by use of ordinary care he might have avoided the exposure, you cannot find any damages for plaintiff on account of sickness, expense, or loss of time incurred. It was the duty of plaintiff, after he was required to get off the cars (if you find that he was), to use ordinary care to avoid the consequences complained of, and if he might have done so by such care he cannot recover for the expense and sickness and loss of time, but in this case he would be entitled to his actual expense in getting home. If, however, you find that plaintiff was a passenger on defendant's cars, was carried beyond his destination where defendant ought to have stopped to discharge him, and after arriving at the tank he was negligently required to get off in the rain and expose himself to inclement weather, and he proceeded home in the rain, and if you find that he used ordinary care to avoid such exposure, and of this you are to judge from the circumstances, you will find for plaintiff his actual expenses in going home and a reasonable compensation for such exposure; and if you further find that such exposure caused him to be sick as alleged, and the sickness was the proximate cause or the natural and necessary consequence of the exposure, you will also find for plaintiff such other and further amount, as damages, as he may be entitled to by way of pecuniary compensation for his pain and suffering, physical and mental, attending and incident to his sickness, and also such other amount as he necessarily incurred for medical bills and for loss of time."

*Davis & Beall* for appellant.

*E. L. Antony* for appellee.

WEST, A. J.—Time will not permit of our entering into an extended consideration, discussion, and comparison of the many authorities bearing on the interesting question now before us, with a view of determining with entire precision what, under the facts of this particular case, is the true rule by which the jury should be guided in ascertaining the amount of damage (if any) sustained by the appellee for which the appellant is legally answerable.

We have, however, given the case a great deal of consideration, and have examined very carefully all the authorities on the subject that we have access to at this point.

In this investigation we have been greatly aided by the carefully prepared brief of the able and experienced counsel representing the appellant.

We must, however, under the circumstances, content ourselves in disposing of the questions raised by the assignment of error, with stating that we believe the district court committed no serious error in holding that the pleadings of appellee, as finally amended, presented, in substance, in a sufficiently intelligible manner (though not as clearly and distinctly as should have been done), a good cause of action against the appellant for the damages claimed.

The charge of the court, taken as a whole, cannot be said to be erroneous, and fairly enough presented to the consideration of the jury the main issues in the case. Nor was there error in refusing the instructions asked by the appellant, under the facts and circumstances of the case as developed by the evidence.

In the examination of the questions raised, much attention has been given to the case of *Hobbs v. L. & S. W. R. R. Co.*, 10 L. R., Q. B. 111, and also to the case of *The Indianapolis, etc., R. R. Co. v. Birney*, 71 Ill. 391. The well-considered case of *Walsh v. Chicago, M. & St. Paul R. R. Co.*, 42 Wis. 23-28, as well as other kindred authorities bearing directly on the immediate question under consideration, has also been examined.

Much attention has also been given to the discussion of the rule in *Hadley v. Baxendale*, 9 Exch. 341; s. c., 26 Eng. L. & E. R. 398. See Sedgwick on Meas. of Dam. (7th ed.), vol. 1, pp. 122 and 218 to 230 *et seq.*

As before stated, after as full and as careful a consideration of the subject as we have been able to give it, we have come to the conclusion that the English rule, laid down in the above cases, and others following them, is too narrow and restricted, and that a more liberal one, in estimating the damages in this class of cases, should be applied.

We believe that in cases of the character now under consideration the just and proper rule is: that the appellant, having unquestionably violated its contract of carriage with the appellee, should be held responsible in damages to him for the discomfort, inconvenience, sickness,

ENGLISH CASES  
DISAPPROVED.

RULE OF  
DAMAGES FOR  
CARRYING BE-  
YOND DESTINA-  
TION.

expenses, costs, and charges which are shown by the proof in this case to have been the direct and proximate, natural and probable result of the appellant's breach of duty.

In this view of the subject we are fully sustained by the following cases: *Brown v. Chicago, etc., R. R. Co.*, 54 Wis. 343; *Klein v. Jewett*, 26 N. J. Eq. 474; *Matteson v. N. Y., etc., R. R. Co.*, 62 Barb. 364; *Memphis, etc., R. R. Co. v. Whitfield*, 44 Miss. 466; *Spicer v. Chicago & N. W. R. R. Co.*, 29 Wis. 580; *Heirn v. McCaughan*, 32 Miss. 17; *Weed v. Panama R. R. Co.*, 17 N. Y. 363.

REVIEW OF AUTHORITIES.

To these many other cases could be added to the same effect.

In the recent work of Sutherland on Damages, vol. 1, pp. 78, 102, 103, published during the present year (1884), the author, after discussing the rule as to the measure of damages in cases like the one now under consideration, and reviewing the more recent authorities, states that the rule laid down in the case of *Hobbs v. L. & S. W. R. R. Co.*, cited above, is considered now, at this day, "too strict" to be applied in cases like the present. He also, in this connection, criticises very properly the views announced in that case as to what are "secondary consequences," and what matters may be properly considered as "the result of the breach" of the contract of carriage.

After reviewing quite fully the more recent authorities, he announces, as gathered from their consideration, the better rule to be: That in this class of cases, where the sickness or injury or discomfort is the direct or the proximate consequence of the wrongful act, the resulting pain and suffering are also elements of the injury, for which compensation may be rightfully demanded.

On this same subject, also, Field, in the revised edition of his work on Damages, p. 343, observes:

"Where there was an agreement to take a passenger at a certain point, and a failure on the part of the carrier to stop at that point, and in consequence thereof the passenger suffered great bodily exposure, these facts may be shown in aggravation of the damages sustained."

In this connection, too, the case of *Williams v. Vanderbilt*, 28 N. Y. 217, may also be examined, and will be found to fully sustain the views here expressed, as applicable to the class of cases like the one now under consideration.

This question, too, has been carefully considered by our own court of appeals, and the rule as to the measure and elements of damage in this character of suit was laid down by them very clearly in accordance with the above-cited authorities, and in harmony with the views herein expressed on that subject. See the interesting case of *The H. & Tex. C. R. Co. v. Rand*, Tex. Ct. App., W. & W. Civil Cases, sec. 255.

Under all the circumstances and facts of this case, as before

stated, we are of the opinion that the pleadings of the appellee, as finally amended, set forth fairly enough a good cause of action, and a proper case for the character of damages demanded.

We do not consider the objection raised to the introduction in evidence of the testimony of the physicians. Doctors TESTIMONY OF ATTENDING PHYSICIANS. Antony and Threat, as well taken. As a matter of fact, too, it appears from the record that a Doctor Threat was the first physician who was in actual attendance on the appellee.

It would have been more satisfactory, perhaps, to have had before the jury the evidence of the other attending physician; the record shows, however, that he was prevented from testifying by sickness at the time of the trial. Under the circumstances, the admission of the evidence of Doctor Antony worked no injury to the appellant, and was, we think, competent evidence as to the matters to which he testified.

The Texas cases cited by the appellant have all been carefully examined, and are not believed to contain anything at variance with the views herein expressed, as applied to the special case in hand.

The judgment of the district court is affirmed.  
Affirmed.

**Measure of Damages where a Passenger is Carried beyond his Destination.**—See note to Cincinnati, etc., R. R. Co. v. Eaton, 18 Am. & Eng. R. R. Cas. 259.

POTTER

v.

WILMINGTON AND WELDON R. R. Co.

(*Advance Case, North Carolina. 1885.*)

A girl nine years of age caught her foot in a rail laid down on the station of a railroad company as she was about to take passage on a train. She fell, breaking her arm. The rail was not defective, and the girl if she had looked down could have avoided injury. In a suit by her against the railroad company to recover damages, *held* that the company was not liable.

CIVIL action tried before Gudge, Judge, and a jury, at fall term, 1884, of Halifax Superior Court.

The plaintiff, a girl nine years old, suing by her next friend, brought this action to recover damages for injuries sustained by her in the breaking of her arm while she was approaching the defendant's passenger train at Weldon to go on the same from that place as a passenger to Halifax, a station on the defendant's road.



She alleges that the injury was occasioned by the negligence of the defendant in failing to keep the passage-way for persons going on its train in good and safe condition and repair.

The evidence was that the defendant and two other railroad companies, each, had a railroad track, a short section of each road, constructed in the usual manner, upon lines a few feet apart, nearly or quite parallel each with the other, under a large shed common to all the companies at Weldon in this State. Passenger trains on each of these roads stopped regularly under this shed to let off and take on passengers and baggage, and transfer passengers and baggage from one train to another. No platform or elevation of any kind was used for such purpose; passengers got on the train directly from the ground, and getting off it stepped immediately upon the ground.

One of the tracks mentioned lay between the defendant's track and that on which the plaintiff fell and broke her arm.

The plaintiff, going a way frequently used by persons approaching defendant's train, while crossing the track of the Petersburg R. R., hitched her foot, as she testified, under the bottom of the iron rail and fell. She did not know whether there was any open space under the iron rail or not; she was looking in front of her towards the hotel; she had crossed one iron (meaning the iron rail) and struck the next one and fell. She said, "If I had been looking where I was walking, I could have kept from falling."

A witness who was with the plaintiff at the time of the accident testified that only two trains met at Weldon at that time; one train had arrived; the defendant's train was expected in a few minutes; many persons were then passing about; no engine moving there at the time the accident occurred, two or three minutes before schedule time for arrival of the train. This witness and plaintiff were going direct to the hotel; he said, "I was a step before her; she fell at the rail; I did not see her strike her toe; there was some elevation between this and next track on which she fell; there was a ridge of dirt two or three inches in height; the cross-ties were filled in between with earth even with the ties, smooth, and the dirt half-way of the rail; she could not have hung her foot under the rail. She is a child of average intelligence; she was nine years old. One looking where he was walking could get over safely. The rails were of 'T' iron. Track has been filled since the accident. More dirt in middle, but not more against the rails. Flange of the engine keeps the dirt away from the inside of the rail two or three inches."

Another witness testified that, "during the spring before the accident, the track was raised; track was not filled, end of sills exposed; enough of iron was exposed for the toe to catch under the rail; space of half-inch under the rail to the dirt. This is a common pass-way."

Another witness testified that the "track had been in the same condition it was at the accident some time before—a year or more. Dirt even with the ties in the middle of the track; flange of the rails covered. She could not get her toe under the bottom of the rail." It is admitted in the case for this court, agreed to by the counsel of the parties, that "plaintiff struck her toe against the inner rail of the Petersburg R. R. track."

The court instructed the jury that, accepting the evidence as true, there was no negligence on the part of the defendant. They rendered a verdict accordingly. There was judgment for the defendant, and the plaintiff appealed to this court.

*Mullen & Moore* and *A. J. Burton* for plaintiff.

*Day & Zollicoffer* and *R. O. Burton, Jr.*, for defendant.

**MERRIMON, J.** (after stating the facts as above).—We think that the court gave the jury the proper instruction. In any view of the evidence, negligence on the part of the defendant did not appear from it. The injury the plaintiff sustained was the manifest result of her own misadventure and misfortune, and not of the negligence of the defendant. She was passing towards defendant's track, at a point where she intended to go on its train as soon as it should arrive, as a passenger, and while crossing the Petersburg R. R. track she "struck her toe against the inner rail" of that track and fell to the ground, breaking her arm by the fall. It does not appear that the fall was occasioned by any unevenness of the ground, or a hole in it, or obstructions allowed to be temporarily or permanently at and about the place where she fell. It seems that the surface of the ground was nearly level, except that the inner rail of the track was slightly above the surface, and immediately inside of the track on each side there was a small channel or opening in which the flange of the engine-wheel moved. This opening was necessary and unavoidable. It was easily passed over and without danger, if the person crossing it would give even slight attention to his movements. The track, the rail, the channel inside of and along it, the ground about it, were all plainly to be seen, and interposed slight or no obstacle to an ordinary person passing that way. The plaintiff herself testified that if she had been looking where she was walking she would have kept from falling, and the witness who had charge of her testified that "one looking where he was walking could get over safely." If she had given slight attention to her steps she would not have encountered the misfortune that befell her.

Railroad companies, as common carriers, are necessarily and justly held to a high measure of care, circumspection, and responsibility, especially in respect to the safety of passengers —indeed, of all persons whom they transport—but they are not required to do, or have, or observe such things as, under

FAILURE TO LOOK  
WHERE WALKING  
IS CONTRIBUTORY  
NEGLECT

DUTY OF RAIL-  
WAY COMPANIES.

the circumstances of the matter in question, are unreasonable. In the nature of their business, some things necessarily attended with more or less danger are essential. Such things they are required to make as safe as practicable, to keep them so, and use them properly and cautiously. When they do so, and a passenger, through his lack of caution or his negligence, suffers injury from such dangerous thing, the company is not responsible for such injury. Passengers on their part are required to observe proper caution, to see and avoid danger when they reasonably can, and if they will not they must suffer the consequences of their rashness, the company being free from fault. What is due caution must depend largely upon the nature of the danger encountered and the circumstances of the person endangered at the time.

The channel or opening just inside of the rail of the track caused the plaintiff, as she incautiously walked along, to strike her toe against the exposed side of the rail, and she fell to the ground and broke her arm as a consequence. She could easily see the rail and the opening and avoid any danger from it. The defendant was in no default—it was not negligence on the part of the company owning the road, or the defendant, to allow it to be there—it was essential. The company could not, in the nature of its use and purpose, dispense with it and keep it closed, and it was not bound to do so. The plaintiff was bound to take notice of it and avoid danger from it at her peril.

We pass by the question whether the defendant could, in any view of the matter, be held responsible for defects, if such had existed, on and just about the track of the road of the Petersburg R. R. Co.

No error. Affirmed.

**Duty of Railroad Company in Regard to keeping its Station in Repair, Safe, and Properly Lighted.**—See note to *Buenemann v. St. Paul, etc., R. R. Co.*, 18 Am. & Eng. R. R. Cas. 155; also note to *Delaware, Lack. & Western R. R. Co. v. Napheys*, 1 *Ibid.* 60.

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### CARPENTER

v.

BOSTON AND ALBANY R. R. Co.

(97 *New York Reports*, 494.)

It is the duty of a railroad corporation to provide for a passenger a safe passage to the train he desires to take, and to take reasonable care that he shall not while on its premises be exposed to any unnecessary danger, or to one of which it is aware. It is bound to exercise the utmost vigilance, not only in guarding its passengers against careless interference by others, but

even against violence; and if, in consequence of neglecting this duty, a passenger receives injury, which, in view of all the circumstances, might have been reasonably anticipated, it is liable.

In such cases, however, *scienter* is the gist of the action.

Plaintiff, having purchased a ticket, went upon the platform prepared for passengers at defendant's depot at C. for the purpose of taking a train which was approaching. A postal car was attached to the train, and as it passed the platform the postal clerk, an employee of the United States, threw out a loaded mail-bag, which struck and injured plaintiff. In an action to recover damages for the injury, it appeared that this had been for a long time the customary method of discharging mail-bags from postal cars at said depot, at times when passengers were upon the platform, and under circumstances from which notice to the defendant might be fairly implied. It did not appear that defendant had taken any precaution to prevent injury. *Held*, the fact that the postal agent was not in defendant's employ did not relieve it from liability; and that the circumstances authorized a finding of negligence upon its part; that it was not necessary, in order to charge defendant with the duty of care and vigilance, to show that on some former occasion a like injury had happened.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 2, 1882, which affirmed a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

Plaintiff, desiring to take passage on defendant's road, and having purchased a ticket, went out on the platform of the depot at Chatham village, waiting for an approaching train. The train had a postal car attached, ahead of the passenger cars. As said car passed the platform a heavily loaded mail-bag was thrown therefrom by the postal clerk or agent in charge, and struck plaintiff, who was walking along the platform toward the passenger cars, inflicting serious injuries.

The further material facts appear in the opinion.

*Charles L. Beale* and *Robt. E. Andrews* for appellant.

*John Cadman* for respondent.

DANFORTH, J.—The plaintiff was injured before the actual commencement of his journey, but he was lawfully on the platform because he was a passenger, and was approaching the train, as the defendant concedes, "in the usual and ordinary way," to enter the car in which he had purchased a right to travel. The law in such a case is well settled. It imposes an obligation on the railroad company to take reasonable care that a person holding that relation to it shall while on its premises be exposed to no unnecessary danger or one of which it is aware, and requires it to provide for him a safe passage to the train. It is obvious that was not done in this case. The plaintiff was knocked down and severely hurt by a loaded mail-bag

PASSENGER LAW—  
FULLY ON PLAT-  
FORM. DUTY OF  
RAILWAY COM-  
PANY.

thrown from the postal car while the train was in motion, and the only answer to his demand for compensation is that the missile was negligently thrown by the person in charge of the mail car, an employee or servant of the United States, and not of the company; that he was an independent agent, and hence, the defendant says, it is not liable for his act. In support of this contention its learned counsel cites *Nolton v. Western R. R. Co.*, 15 N. Y. 444; *Blair v. Erie R. R. Co.*, 66 Id. 313; *Penn. R. R. Co. v. Price*, 1 Am. & Eng. R. R. Cas. 234; and *Putnam v. Broadway, etc., R. R. Co.*, 55 N. Y. 113.

I am unable to give to those cases that consequence. The Pennsylvania case (reported in 96 Penn. St. 256) was an action against a railroad company for damages for the death of a postal clerk, caused by a collision. A recovery was denied, but the question turned solely upon the construction of a statute of that State. It has no application here. But if it had, the decision is directly opposed to that of this court in cases also cited by the respondent, viz., *Nolton v. Western R. R. Co.* and *Blair v. Erie R. R. Co.*, *supra*, in each of which a recovery was had on the ground that the defendant owed a duty to the person injured (in one case a postal clerk and in the other an express agent), and neglected to perform it. That principle we think the plaintiff may also successfully invoke, and find support in the other case (*Putnam v. Broadway, etc., R. R. Co.*, *supra*) cited by the respondent.

It was there *held*, in substance, that a railroad company was bound to exercise the utmost vigilance not only in guarding its passengers against careless interference by others, but even against violence; and if in consequence of neglecting this duty he receives injury, which in view of all the circumstances might have been reasonably anticipated, it is liable. The defendant prevailed in that case on the ground that the mischief was one which it had no reason to expect, and so was under no obligation to guard against. But if it had been made to appear that he who made the assault was vicious and accustomed under similar circumstances to do hurt, and the defendant had been notified of the fact, a duty would, as the case also holds, have been imposed upon it either to remove him from the car, or inform its other passengers of their danger, and failing to do so, would be responsible for such harm as he occasioned. To the same effect is *Muster v. C. M. & St. P. R. R. Co.*, 18 Am. & Eng. R. R. Cas. 113. There the plaintiff was at work for the defendant at its depot, standing on a scaffold erected by it; the defendant's train, of which a mail car formed part, ran past, and a mail-bag thrown from it by a postal agent struck the leg of the scaffold with such force that it fell and the plaintiff was injured. He failed in his action. Upon appeal, the court, in answer to the claim that the defendant was negligent in not informing the

plaintiff of his peril, said: "All the evidence on that subject is to the effect that the mail-bag was usually discharged near the mail-catcher, which was two hundred feet west of the depot, and there is no testimony whatever that it had ever before been thrown off at the depot," adding, "the company is not chargeable with notice that it was likely to be thrown off at the depot, and hence was not required to guard, by notice or otherwise, against an accident to the plaintiff resulting from its being thrown off there on the occasion in question." In such cases no doubt *scienter* is the gist of the action, and in those cited it was lacking. In the one before us, it was clearly established. The defendant constructed the postal car and owned it. It was occupied under defendant's permission for a certain use, and it may be conceded that there was nothing in the nature of that use to require the defendant to expect that the contents of the car would be violently cast upon the platform while the train was in motion, and before the passengers thereon could reach the cars. Had this accident, therefore, happened on the first passage of the car, the defendant might be excused, as in the case cited, on the ground that the mere act of the postal clerk in throwing off the mail-bag at that place, without the previous knowledge of the defendant of his intention to do so, was not negligence on its part.

But the fact is quite otherwise. The practice which led to the accident was a familiar and usual one. It was proven by uncontradicted evidence that this method of discharging mail-bags from the postal car, upon the platform provided for passengers, and while they were upon it and exposed to injury, had prevailed for a long time, under circumstances from which notice to the defendant might be fairly implied, and with the actual knowledge of the defendant's agents, in whose presence the act was frequently, if not daily, performed, and, so far as appears, without the slightest objection on their part. They were, therefore, chargeable with notice that the mail-bag was likely to be thrown off in the same manner and under the same circumstances at any arrival of a postal car. By this knowledge the defendant was brought fairly within the rule which enjoins care, not only on the part of itself and its servants, but also like care in preventing injury from the careless or wrongful act of any other person whom it permits to come upon its premises.

The occupants of the postal car are no exception to this rule; they were not strangers or uninvited. They came under a contract voluntarily made by the defendant and which secured the carriage and delivery of the mails upon such conditions as it imposed or acceded to. Its police power extended over the persons employed in it, while they were on the defendant's track or at its stations, certainly not to interrupt them in the discharge of their official duties, but so far as practicable to prevent injury to those for

whose safety it was bound to provide. So it was held in *Stewart v. Brooklyn and Crosstown R. R.*, 90 N. Y. 588; s. c., 12 Am. & Eng. R. R. Cas. 127, applying the rule to violence committed by strangers and co-passengers, in *Flint v. Norwich & N. Y. Trans. Co.*, 34 Conn. 554, to violence from whatever source arising, and this although the aggressors were soldiers received upon the boat on compulsion. The doctrine of that case is approved and its reasoning followed in the case of *Putnam*, *supra*.

Nor was it necessary, in order to charge the defendant with the duty of care and vigilance, that on some former occasion a like injury had happened. The act was itself dangerous. There was, under the circumstances of which the defendant had notice, a natural and probable connection between the act of throwing out a mail-bag with its contents and the injury which actually happened. It could have been foreseen, and the defendant owed a duty to those who might probably be on the platform, either to prohibit the practice which made the place dangerous, or exclude the passenger until train-time, or provide some other way for ingress to the cars, or at least give notice to him that he must take care and avoid the danger, or in some other way use reasonable caution to prevent damage from the danger, of which it knew or ought to have known. Whether such reasonable care was taken, by notice, guarding the way, or otherwise, must be determined as a matter of fact. So far as the case now discloses, the defendant failed to do either of these things. It seems to me, therefore, that the plaintiff's evidence tended to establish every proposition which, as set forth in his complaint, constituted a fair cause of action—damages occasioned by the omission of duty which the defendant owed to him, and that he was not himself in default. These were questions for the jury and should have been submitted to them. The plaintiff was, therefore, improperly nonsuited.

It follows that the judgment of the Special and General Terms should be reversed and a new trial granted, costs to abide the event.

All concur, except RAPALLO and FINCH, JJ., dissenting.  
Judgments reversed.

**Knowledge or Means of Knowledge of Railroad Company as to Causes likely to produce Injuries, as bearing on the Company's Liability.**—The decision of the principal case rests on the duty that a railroad company is under to provide for the safety of its passengers as far as human care and foresight will go; that is, to use the utmost care and forethought to discover and control all causes likely to produce injurious effects to passengers, in so far as it can do so by the use of the most efficient means or agencies which the nature of its business will admit of. *Hutchinson, Carriers*, §§ 499 *et seq.*

The throwing off the mail-bag was evidently a cause which, in the nature of things, was likely to result in injury to passengers; and hence if the company could have foreseen that act as one likely to occur, it was under a duty or obligation either to prevent the act or protect their passengers from inju-

rious results from it. For a case precisely similar to the principal case and decided the same way, see *Snow v. Fitchburg R. R. Co.*, 18 Am. & Eng. R.R. Cas. 161.

**Railroad Company Liable to Passengers for Insulting or Injurious Acts of its Employees entrusted with the Care of Passengers.**—It is thought well, in this connection, to distinguish a class of cases where the railroad company is held liable for acts which it could not foresee and avert. This class of cases is where a servant of the company, entrusted by it with the care of and supervision over passengers, commits some act toward a passenger in direct violation of his duty to look out for the comfort and safety of passengers. Thus, in *Cracker v. Chicago, etc., R. R. Co.*, 36 Wis. 657, it was held that a railroad company was liable to a female passenger for the act of a conductor in kissing her against her will while she was riding as a passenger on one of its trains, notwithstanding the fact that such act was wholly without the scope of his employment, and, we may assume, could not have been foreseen by the company as likely to occur. See also *Stewart v. Brooklyn & Cross-town R. R. Co.*, 90 N. Y. 588; s. c., 13 Am. & Eng. R. R. Cas. 127; *Chicago, etc., R. R. Co. v. Flexman*, 103 Ill. 546; s. c., 8 Am. & Eng. R. R. Cas. 354; and cases cited in all three cases.

These cases go on the principle that the duty of the company to provide for the protection and comfort of its passengers, is one which it must perform through employees, and that, in regard to such duty, such employees stand in the place of the company, and that their breach of this duty is that of the company. The duty of the company to passengers is not merely to provide employees, apparently suitable and efficient, to look after the comfort and safety of passengers; it must guard the passenger against injurious or insulting acts which such employees could, by exercise of the utmost care and prudence, avert or avoid, including injurious and insulting acts of the employees themselves.

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## HAMILTON

v.

## TEXAS AND PACIFIC R. R. Co.

(*Advance Case, Texas.* 1885.)

A railroad company is under special duty to persons who come upon its premises for the purpose of doing business with it as a common carrier to provide suitable and safe accommodations with regard to its depot. The company is under like obligations to "persons who are on the premises to welcome the coming or speed the parting guest."

If the infirmities of passengers to go on the train require the assistance of others to see them safely on board, servants or friends attending them for that purpose are under an invitation of the company as direct as that given passengers themselves. See rule as to hackmen.

*Carter, Wynne & De Berry* for appellant.

No appearance for appellee.

May 26, 1883, S. B. Hamilton, appellant, and Mollie F. Hamilton, his wife, instituted this suit in the district court of Tarrant County, Texas, against the Texas & Pacific R. R. to recover



damages for alleged injuries suffered by the said Mollie F. Hamilton by reason of her falling from a defective platform of the defendant railroad company at Ben Brook, in Tarrant County, Texas, on defendant's line of railroad, by reason of its being improperly lighted and provided with railings and safeguards.

November 26, 1884, Mollie F. Hamilton, took a nonsuit, and the suit then proceeded in the name of S. B. Hamilton. On the said day defendant's special exception was sustained, and the plaintiff declining to amend, his cause was dismissed.

Plaintiff made a motion to reinstate his cause, which the court refused. Plaintiff excepted to the ruling of the court, gave notice of an appeal, assigned errors, and brings this cause to this court for revision.

The error assigned by appellant relates to the sustaining of a special exception filed by the defendant and dismissing the plaintiff's cause. This assignment is as follows:

The court erred in sustaining defendant's special exception No. 2 to the plaintiff's first amended original petition, filed November 25, 1884, and in dismissing the plaintiff's cause.

The petition in substance alleged that the defendant was a railroad corporation, organized under the laws of Texas, and owned and operated the railroad and appurtenances thereto belonging known as the Texas & Pacific R. R.; that said railroad extended from Texarkana, Bowie County, Texas, to Ben Brook, Tarrant County, Texas, and through said County of Tarrant; that said company was a common carrier of passengers on said road between said points for hire; that said company had an office and representatives in the city of Fort Worth, Tarrant County, Texas; that said company had a depot, waiting-room, and platform abutting on its said railroad at Ben Brook, Tarrant County, Texas, which were owned and used by said company as a place for passengers to get on and off its trains, and over and along which all persons lawfully at said depot were accustomed and were authorized by said company to pass; that said platform was at a height of five feet from the ground; that said company, using and controlling said depot and platform as a place for passengers on its trains, and their attendants to await the arrival of and get on and off its trains, and over which said passengers and their attendants were accustomed and authorized by said company to pass for said purpose, and said depot being the regular stopping-place for defendant's said trains, were bound to keep said station and platform and the approaches thereto in safe condition, and to provide lights for said depot and platform and the approaches thereto in the night-time,—all of which said defendant, disregarding its duties as a common carrier, on April 27, 1883, failed and refused to do. That on the night of said day defendant suffered its said platform at said depot to be without proper railing and steps to protect against accidents to its passengers and their

attendants; that at 3 o'clock A.M. on the morning of said day, plaintiff, S. B. Hamilton and his wife, Mollie Hamilton, went to said depot to accompany and assist two old and decrepit friends of plaintiff and his wife, to wit: Benjamin Tolson and wife, who had been visiting at their house, and who were now about to take defendant's east-bound train at said depot; that while plaintiff's wife was passing along said platform, assisting said Tolson and wife to go from defendant's waiting-room in its said depot and to get aboard defendant's east-bound train, the same being the customary way for passengers and their attendants to go for such purpose, of which defendant had notice, and that, being wholly unaware of danger, said plaintiff's wife, without fault or negligence on her part, and by reason of defendant's wilful and careless disregard of its duty as a common carrier in failing to provide safe and necessary steps and railings about its said platforms and approaches thereto, and to provide necessary light burning about said platform, was then and there precipitated from said platform and thrown violently upon the ground, whereby she was greatly injured, being wounded and cut insomuch that she was caused great pain and became sick, lame, and sore, in which condition she has since continued by reason of said injuries, and is compelled in consequence of the same to go about on crutches; that she has been permanently injured, and is unable to attend to her household duties; that plaintiff had for a long time been deprived of and for a long time would be deprived of the assistance and services of his said wife, and was compelled to expend, and did expend, two hundred dollars in attempting to cure his said wife, and was otherwise greatly injured.

The defendant answered by way of general demurrer and special exception as follows: For special exception defendant said that it appears from the petition and amendments thereto that said plaintiffs were not at defendant's depot and platform as passengers intending to take the train, but were on said platform for the purpose of assisting adult persons in taking passage on said train, and no other business, as alleged in said petition and amendments; and defendant says that it owed plaintiff no special duty with regard to said platform at the time of the alleged injury sustained, and that said defendant is not liable in law therefor, and of this prays judgment.

WALKER, P. J.—The court erred, we think, in sustaining defendant's special exception to the plaintiff's petition. The principle seems to be well settled that a railroad company "is under a special duty to persons who come upon its premises for the purpose of doing business with it as a common carrier. In this case it gives an invitation as well as a license, and does so under the expectation of profit therefrom. It must

DUTY OF RAIL-  
WAY COMPANY  
TO FRIENDS OF  
PASSENGERS.

provide and maintain for them safe approaches to the station and safe platform." *Pierce on Railroads*, 275.

The important question in this case is whether the plaintiff shows, under the facts alleged in his petition, that he and his wife are persons who are to be regarded as being embraced within the above rules. The limitations of the rule as to those who are and those who are not comprehended within it are fully stated in several well-considered cases of high authority, and, without attempting a discussion of the subject, we will content ourselves with following what seems to be the rule established by those decisions, to the effect that the plaintiff is clearly within the protection of the rule. Among those whom the company is under this obligation are "persons who are on the premises to welcome the coming or speed the parting guest." *Pierce on Railroads, supra*.

The plaintiff and his wife occupied that relation, and more—they went to the defendant's depot as assistants as well as friends, in order to aid two old and decrepit persons whose business was to take the defendant's train. If the infirmities of passengers to go on the train required the assistance of friends to see them safely on board, servants or friends attending them for that purpose would clearly be in attendance at the depot under an invitation of the company as direct as that given to the passengers themselves, or to hackmen who carry them to and from the station.

In the case of *Tobin v. Portland, S. & P. R. R.*, 59 Me. 183, where a hackman who was accustomed to carry passengers to and from a railroad depot was injured by a defect in the platform, he was held entitled to recover, upon the ground that he was there by the license and permission of the railroad company, and by the accommodation afforded by him to travellers actually contributed to help the company's business. 8 vol. Am. & Eng. R. R. cases, p. 551. And it seems to have been taken for granted, in case of *Logan v. Iron M. & S. R. R.*, 73 Mo. 392, 3 Am. & Eng. R. R. Cas. 357, that where a person was at the station helping off a friend with his trunk, the company was bound to exercise as to him due care.

As to parties speeding and welcoming friends at railroad stations, the following cases are compiled in vol. 18, p. 156, Am. & Eng. R. R. cases, showing the liability of the company for injuries occasioned to such parties while at the station, viz.: *Lucas v. New Bedford R. R.*, 6 Gray, 64; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Doss v. Missouri R. R.*, 59 Mo. 27; *Langan v. St. Louis R. R.*, 3 Am. & Eng. R. R. cases, 355; *McKone v. Michigan Central R. R.*, 13 Am. & Eng. R. R. cases, 29.

We conclude, therefore, that the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

See note to *Buenemann v. St. Paul, etc., R. R. Co.*, 18 Am. & Eng. R. R. Cas. 156.

## STONER

v.

## PENNSYLVANIA COMPANY.

(98 *Indiana Reports*, 854.)

It cannot be inferred as a conclusion of law, that getting on a passenger train at a place other than the platform was negligence of the passenger contributing to an injury received while entering the car, in consequence of a violent and negligent starting of the train. An answer stating such fact is, therefore, bad on demurrer.

From the Clark Circuit Court.

*P. H. Jewett, C. L. Jewett and H. E. Jewett* for appellant.

*S. Stansifer and W. D. Stansifer* for appellee.

HAMMOND, J.—Complaint in two paragraphs by the appellant, a minor, who sues by his next friend, to recover damages for an injury received while a passenger on the appellee's railroad train. The appellee answered in two paragraphs. The first was the general denial; to the second the appellant's demurrer for the want of facts was overruled, and an exception taken. Trial by jury; verdict and judgment for the appellee. The overruling of the demurrer to the special paragraph of answer is the only error assigned in this court.

It is averred in both paragraphs of the complaint, that on the 24th day of December, 1881, the appellee was operating a railroad for the conveyance of passengers for hire, called the Jeffersonville, Madison and Indianapolis Railroad, extending from Jeffersonville to Indianapolis, and in its course passing through the towns of Memphis and Vienna, in this State; that on the day above mentioned, the appellant took passage upon one of the appellee's passenger trains at said Memphis to go to said Vienna; that he was forcibly thrown from said train of cars upon the track of the railroad and both his legs run over by the wheels of the train, causing him great pain and suffering, the loss of both his feet by amputation, and great expense. The paragraphs are substantially the same except in the statement as to the manner in which the accident occurred. The first paragraph of the complaint sets out the particulars of the occurrence as follows: "That by the carelessness, negligence, and want of skill of the persons employed by the defendant as its servants, and as such in charge of said train, said train was started and jerked forward with great, unnecessary, and unusual force and violence, by reason of which forcible and violent starting of the said train, the plaintiff, while using due care, and without fault or negligence upon his part, was forcibly

thrown from said train of cars and upon the track of said railroad."

The second paragraph of the complaint, after stating that the appellant applied for a ticket at the office of the appellee at the said town of Memphis, avers, "that he" (the plaintiff) "was unable to procure any such ticket for the reason that said office was closed; that at the time he so sought to purchase a ticket to said Vienna station, a train of defendant's cars, which carried passengers to said Vienna station, was standing still upon the track of said railroad at Memphis, and the locomotive, which had been drawing said train, was detached therefrom and some distance away from the cars composing said train. And the plaintiff avers that he waited for said ticket office to open until a few minutes of the time said train was to start, when he went to the car in which passengers were carried upon said train and took passage upon said train for said town of Vienna, having money sufficient to pay, and intending to pay, his fare upon said train; that plaintiff started to go into said car while the same was motionless upon the track aforesaid, and while, in the exercise of due care on his part, he was ascending the steps leading to the rear platform of said car, the servants of the defendant in charge of said train of cars, running and managing the same, negligently, carelessly, and unskillfully, and without any notice or warning of their intention so to do, ran said locomotive and other cars with great, unusual, and unnecessary force and violence against the car upon which the plaintiff then was, thereby causing said car to start with great and sudden force and violence, by reason of which sudden starting the plaintiff was jerked from said steps and platform and thrown violently upon said railroad.

. . . The plaintiff avers that said shock, concussion and sudden starting of said car was caused, and the defendant [plaintiff?] was jerked from his said position and thrown under said car and injured through no negligence or fault of the plaintiff whatever, but that the same occurred wholly through the fault, negligence and unskillfulness of the defendant and defendant's servants in charge of, and engaged in running, said train."

The only question in the case for our decision arises upon the overruling of the appellant's demurrer to the second paragraph of the appellee's answer. The paragraph of answer referred to is as follows:

"The defendant, for answer to complaint, says: . . . 2d. The first and second paragraphs of plaintiff's complaint relate to one and the same transaction, and plaintiff received his injuries in attempting to board said train, and not other or different. It is averred that at said Memphis at said time and for a long time prior thereto, there was a platform at defendant's depot for the use of passengers departing from and arriving at said Memphis, from and on which to board trains and alight therefrom at said station.

Plaintiff did not attempt to board said train from said platform, but at a point, to wit, one hundred yards south thereof, and where there was no platform. It is averred that neither defendant nor its said agents and employees in charge of said train had any knowledge or notice whatever that plaintiff would attempt to board said train at said place."

The above pleading, it will be observed, does not deny that the car was not in motion when the appellant attempted to enter it. Neither does it deny that the appellant was injured as stated in his complaint, nor that the appellee's employees were guilty of the acts of negligence charged against them. These averments of the complaint, with respect to the second paragraph of the answer, are, therefore, to be taken as admitted. Section 383, R. S. 1881. The manifest object of this paragraph of answer was to defeat the appellant's recovery by showing contributory negligence upon his part in the injury of which he complains. If it was sufficient for this purpose, the demurrer thereto was properly overruled, for the law is well settled that in actions to recover damages for injuries occasioned by negligence, the plaintiff must fail if his own want of care contributed to the wrong complained of. *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490; s. c., 5 Am. & Eng. R. R. Cas. 630. But does the affirmative paragraph of answer, in this case, allege facts from which, as a matter of law, contributory negligence must be inferred? The substantial averment in the answer is that at the town of Memphis, at the time of the accident, there was a platform at the appellee's depot for the use of passengers, but that the appellant did not attempt to go on the train from said platform, but at a place one hundred yards therefrom, of which neither the appellee nor its employees in charge of the train had notice.

BOARDING TRAIN  
AT A DISTANCE  
FROM PLATFORM  
NOT PER SE NEG-  
LIGENCE.

We cannot declare that as a matter of law the entering a passenger train to take passage at a railroad station from a place other than the platform provided for that purpose is an act necessarily contributing to an injury received while thus taking passage. Negligence is usually a mixed question of law and fact—a fact to be found by the jury under the instruction of the court. The court may not declare an act to be negligence unless the act is such as all reasonable men would be likely to draw an inference of negligence from it. If the inferences are doubtful, the question is one of fact for the jury. *Pierce Railroads*, 314.

The appellee's answer does not state that at the time named the train stopped at the platform. It does not aver that the appellee was not in the habit of receiving and discharging passengers at the place the appellant attempted to take passage, as well as at its platform. In *Keating v. New York, etc., R. R. Co.*, 49 N. Y. 673, it was held that when a railroad company has been in the habit of receiving and discharging passengers at places other than

its depot, it is not negligence for passengers to get on or off at such places while the train is not in motion, and there is no apparent danger. And in *Hulbert v. New York Cent. R. R. Co.*, 40 N. Y. 145, a passenger of his own accord had got off the train where it stopped to water, about 250 feet from the station-house. The night of the occurrence was very dark, and he received an injury by falling into an excavation made for a cattle-guard. It was held that the question of contributory negligence was a proper one for the jury. See, also, *Mitchell v. Western, etc., R. R. Co.*, 30 Ga. 22. Cases there are, no doubt, where the circumstances make the taking of passage on a railroad train at a place not provided for that purpose, such an act of negligence as precludes the recovery for an injury thereby occasioned. *Michigan Central R. R. Co. v. Coleman*, 28 Mich. 440, was a case of this kind. There the railroad had a platform south of the track. The plaintiff, a woman, after night when it was quite dark, attempted to enter the train from the north side of the track, just as the train was starting, and fell and was injured. She was not observed by the conductor, whose attention was directed to the care of passengers on the platform side of the track. It was held that the railroad was not responsible. It does not appear in that case but that the train stopped at its usual time and started in a usual manner; in fact no act of negligence upon the part of the railroad employees appears to have been shown in that case.

We think the appellant must, under the facts stated in his complaint, and not controverted by the second paragraph of the answer, be regarded as having been a passenger at the time of the accident. There is no averment of any regulation of the company which required passengers to procure tickets before taking the train. And had there been such a regulation in this case, the appellant was excusable for not complying with it after a proper but unsuccessful effort to obtain a ticket. *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116 (10 Am. R. 103); *St. Louis, etc., R. R. Co. v. Myrtle*, 51 Ind. 556. A person who by mistake gets on a passenger train other than the one he intended to take passage on is a passenger upon the train which he is on. *Columbus, etc., R. R. Co. v. Powell*, 40 Ind. 37. There is no averment in the pleadings from which it appears that the place where the appellant boarded the train was dangerous, or that there was any regulation or custom of the company which did not permit persons to take passage on trains at Memphis station except at the platform. From the facts disclosed in the record we are of the opinion that the appellant became a passenger the instant he stepped upon the train, and that, upon the payment or tender of his fare, he could not legally have been ejected simply because he did take passage from the platform. Being thus a passenger, the company was liable for an injury resulting to him

OMISSION TO BUY  
TICKET EXCUSED,  
WHEN.

BOARDING TRAIN.  
NEGLECTANCE.

from the negligence of its servants, unless his own negligence contributed thereto. The complaint avers that he was without fault or negligence. This averment is not negatived by the second paragraph of the answer. It states that the appellant received his injury while attempting to board the train one hundred yards south of the depot, but it charges no carelessness upon his part in so boarding the train, nor that such act of his in any way contributed to his injury. Herein the special answer is manifestly and fatally defective.

A question quite similar to this was before this court in *Lafayette, etc., R. R. Co. v. Sims*, 27 Ind. 59. That was an action to recover damages for an injury to a passenger. The opinion states that "The defendant answered, that the train on which the appellee was at the time of the injury, was a passenger train; that on all the passenger cars, printed notices that 'passengers are forbid standing on the platform,' were, and always had been, posted; that the appellee, for five years, had been in the habit of riding in the passenger cars of the appellant, where such notices were so posted in conspicuous places, and had notice of such regulation; that at the time of said accident, he was riding upon the platform of one of the passenger cars, and not in the car; that said platform was, and always is, a dangerous place; that at the time of said accident, said appellee was on said platform, and immediately before said accident had been sitting on the brake on said platform, against the will of said appellant; wherefore the appellant says that whatever injury the appellee sustained was the result of his own carelessness and wrong in being in an improper and dangerous place at the time said accident occurred, and from which the injuries complained of resulted."

Commenting on the above answer in that case, the court said: "It will be observed that the answer does not allege, as a matter of fact, that the appellee was injured by reason of his position on the platform of the car, but simply avers that he was informed of the rule prohibiting passengers from sitting on the platform; that he was on the platform at the time of the accident, and that the platform was always a dangerous place. These are all the facts alleged, and from these facts the appellant concludes that the position of the appellee caused his injury. This conclusion, of course, adds nothing to the answer." And again, in the same case, it was further said: "An averment that a passenger occupied a dangerous position upon the train, does not authorize the pleader to draw the conclusion that therefore the injury 'was the result of his own carelessness and wrong.' The conclusions from the facts are to be drawn by the court or jury, and an averment would have better served the purposes of a plea. The facts alleged in the answer may be true, and yet not inconsistent with the averment in



the complaint that the injury resulted from the negligence and carelessness of the appellant, and without the fault of the appellee."

In the case before us, the special paragraph of answer does not state facts from which the court must conclude as a matter of law that the appellant was guilty of negligence in attempting to take passage at the place in question; nor is there any averment that his own want of care in there boarding the train, or any other act of, contributed to his injury. The affirmative paragraph of the answer was insufficient.

Judgment reversed at the appellee's costs, with instructions to the court below to sustain the appellant's demurrer to the second paragraph of the answer, and for further proceedings.

Petition for a rehearing overruled.

See *Brassell v. New York Cent., etc., R. R. Co.*, 3 Am. & Eng. R. R. Cas. 383 and note; *Cincinnati, etc., R. R. Co. v. Peters*, 6 Am. & Eng. R. R. Cas. 133 and note; *Cartwright v. Chicago, etc., R. R. Co.*, 16 Am. & Eng. R. R. Cas. 321.

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## HOUSTON AND TEXAS CENTRAL R. R. Co.

v.

SCHMIDT.

(61 *Texas Reports*, 282.)

While the supreme court will not exercise so great a discretion as the district judge who hears the evidence should in granting a new trial, yet when the record shows that there is a deficiency of evidence to support the action, and it is manifest that the verdict is clearly contrary to the evidence, it has never felt wanting in power to reverse a judgment based on such a verdict. A party under the influence of liquor attempted to get on a train at a station after the conductor had called out "all aboard." While doing so, the train started backwards and he was thrown to the ground and hurt. He recovered a verdict against the railroad company, and a new trial was refused by the court. *Held*, that there was no evidence of negligence to sustain the verdict, and that the judgment entered thereon must be reversed.

**ERROR** from Harris. Tried below before the Hon. James Masterson.

This case is chiefly remarkable for the singular verdict rendered in view of the evidence.

Appellee sued to recover damages for a personal injury. He alleged that he purchased a ticket at Elgin, a station on appellant's road, to be carried to Paige; that soon afterward, at about 8 o'clock P.M., appellant's train arrived at Elgin and came to a full stop at the proper place for passengers to get off and on; that he attempted to get on one of the passenger coaches, and while he had

one foot on the step of the coach, and was in the act of bringing up his other, the train was suddenly and violently backed, causing him to make a misstep and get his left foot and leg caught between two cross-ties in the track, when the train came against him, causing him to bend over while his foot and leg were so engaged, and thereby broke his leg and foot, inflicting upon him a painful and permanent injury. He alleged that the backing of the train was without signal or warning, and was gross carelessness and negligence on the part of appellant's servants in charge.

Defendant below pleaded the general issue. Verdict and judgment in favor of appellee for \$500.

The errors assigned were:

I. There is no legal evidence to support the verdict on which the judgment was rendered, and it is contrary to the law and the evidence, in that it does not show that Schmidt was injured in manner as he alleges.

II. The testimony shows that if Schmidt was in fact injured, it was because of his contributory negligence in attempting to get on the car on the opposite side from the passenger platform at which the train was standing, and which had been erected for the convenience and safety of passengers in getting on and off at that point, and if he had been on said platform he could not have been hurt.

Appellee was the only witness for the plaintiff below as to the manner in which his injury occurred. He testified that he was on the freight platform when the train arrived, and that he walked down the steps and was on the ground between the freight platform and the cars when the conductor called "All aboard." He then attempted to get on; and while he had one foot on the step of the car and was in the act of bringing up the other, the train was suddenly backed, which caused his left foot to miss the step and go to the ground, where it got between two ties. That the backward movement of the train compelled him to bend backward to prevent the train from running over him, and in this way he was injured in his leg and foot.

This statement accorded with the allegation in his petition in reference to the manner and means in and by which he claims to have been injured. He stated that he was not then drunk, and that it took much to make him so.

W. P. Miles testified that he saw him in the evening of the night he was hurt and about thirty minutes after he was hurt, and he was somewhat intoxicated.

Witness Durfee saw the plaintiff about ten minutes after he was hurt. His actions and smell of his breath showed that he was drunk. He sat up with him, and said the influence of the liquor was not so apparent in the latter as in the fore part of the night.

Witness Gordon testified that Schmidt had been drinking dur-

ing that day and was drunk and asleep near the office door on the freight platform when the train arrived. He waked him in the presence of James Quinn.

Witness Quinn saw Schmidt drunk and asleep on the platform and saw Gordon wake him, and heard him tell him the train was coming. Schmidt's condition was such that witness did not think he knew anything.

Witness Quinn says he saw Schmidt leave the freight platform; he did not leave it by the steps, but fell off, and when he struck the side-track he fell, and was at no time nearer the train than the place where he fell; witness noticed him particularly, because he feared he would be run over by the train.

Witness Gordon was present from the arrival of the train until its departure; did not see Schmidt leave the freight platform. The first time he saw him after getting off the platform Schmidt was on the ground by the edge of the side-track and in front of the office door. Just before the train left he saw him holding to the freight platform, and the conductor told witness to go to Schmidt and prevent him from making for the train and thereby being run over. Schmidt was at no time nearer the train than when he was standing holding to the freight platform when the train left.

When the train left, Schmidt was standing holding to the freight platform, standing and acting like a drunken man.

Witness Durfee testified that appellee told him, about ten minutes after he was hurt, that as he went to step on the train some one pushed him back and he caught his foot under the rail. He told witness Gordon, about fifteen minutes after the train left, that he was hurt by the conductor, who kicked him off the train. He told his landlord the next day after he was injured that when he attempted to board the train the engineer started and he fell between the cars. Thus those witnesses testified, but appellee denied that he made any such statements.

Dr. Rutherford stated that the injury might have occurred in the manner testified to by appellee, and could have occurred by jumping from a height as well as in the manner alleged.

Appellee's attending surgeon testified: "He may have been injured as alleged in his petition, but from my long experience I am free to say that it is more than probable that the injury was received from a leap. If it had been received as the plaintiff alleges, his sufferings would have been far greater."

*Baker, Botts & Baker* for appellants.

*Fisher & Kirlicks* for appellee.

STAYTON, J.—It is urged in this court, as it was in the court below on motion for new trial, that the verdict and judgment are contrary

to the evidence, and that it does not show that the appellee was injured in the manner alleged.

It is also claimed that the evidence shows, if the appellee was injured in the manner stated in his pleadings, that the injury was the result of his own contributory negligence.

A careful inspection of all the evidence makes it too apparent to us that these propositions are true, and that the verdict is contrary to the evidence.

The facts and circumstances testified to by and for the appellee, and the uncontroverted testimony of other witnesses, renders it almost as certain as human testimony can render certain any fact, that the appellee was not injured in any manner through the negligence of the appellant or its employees. These matters were brought to the attention of the court below, in the motion for a new trial, and should have been considered sufficient.

While the verdict of a jury is entitled to great weight when rendered on evidence reasonably sufficient to sustain it, yet, when rendered contrary to evidence, or against the great preponderance of the evidence, and it is most likely that injustice has been done, trial courts should not hesitate to grant new trials.

This court does not exercise the same latitude of discretion in this respect as does the trial court, but when it is manifest that a verdict is clearly contrary to evidence, it has never felt wanting in power to reverse a judgment based on such a verdict. *Long v. Steiger*, 8 Tex. 462; *Taylor v. Ashley*, 15 Tex. 50; *Patton v. Evans*, 15 Tex. 363; *Willis v. Lewis*, 28 Tex. 192; *Zapp v. Michaelis*, 58 Tex. 275; *G., H. & S. A. R. R. Co. v. Bracken*, 59 Tex. 71 (1 T. L. R. 248); *Garvin v. Stover*, 17 Tex. 295; *Edmundson v. Silliman*, 50 Tex. 112; *Chandler v. Meckling*, 22 Tex. 42.

In the case last cited it was said: "One of the substantial rights of a party defendant, when he takes the proper steps to demand it, is that the facts alleged as a ground of action against him should be established by proof reasonably sufficient. When there is proof reasonably sufficient, but which is opposed by evidence leading to a contrary conclusion, there is then presented a case of conflicting evidence, in which it is difficult, and often impracticable, for the court to interfere. Hence the rules (governing all courts) in relation to evidence greatly conflicting have been established. The same difficulty, however, does not exist where there is a deficiency in the proof adduced to establish the cause of action. It will not do for the court to say that there is some evidence to support the verdict, and it must stand. In such cases the true question must be, Is the evidence reasonably sufficient to satisfy the mind of the truth of the allegations? Doubts as to this point, if they exist, may be thrown in favor of the verdict. But when it is clear that the evidence adduced is not reasonably sufficient (under all the cir-

JUDGMENT RE-  
VERSED WHEN  
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cumstances of the case) to satisfy the mind of the truth of the allegations, then the verdict should be set aside, on the proper motion being made. When it is made to appear, or is obvious to this court, that such rule has not been observed by the district court, it then becomes a proper subject of revision by the supreme court."

We think this, the whole case being considered, such a case; but in view of the fact that the judgment will be reversed and another trial be had, comment will not be made on the evidence.

Reversed and remanded.

**Intoxication as Contributory Negligence.**—"A drunken person sometimes acts with great care, although the contrary is undoubtedly the general rule." *Shear. & Redf. on Neg.*, § 487. "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it." *Heydenfeldt, J.*, in *Robinson v. Pioche*, 5 Cal. 460. And presumably as much entitled to a safe railroad train or car. "Intoxicated persons are not removed from all protection of law; the plaintiff was bound to show that he was in the exercise of due care, by himself or others; his intoxication had nothing to do with the accident; the city may be liable under some circumstances for an injury sustained by . . . an intoxicated person if the condition of the injured person does not contribute in any degree to occasion the injury" (*Alger v. Lowell*, 3 Allen (Mass.) 406), "which," says Mr. Beach, "is very nearly the same thing as to say that the mere concurrence, in point of time, between the plaintiff's intoxication and the happening of the injury will not, in itself, be sufficient to bar the right to recover. When contributory negligence is the issue, it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety, or he may have his action. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, and not whether or not the plaintiff was drunk. As sober men are frequently careless and guilty of negligence, so it very occasionally happens that drunken men are careful and prudent, or if negligent, their intoxication cuts no figure in the matter. From which the law infers that there is no proper and necessary connection between sobriety and carefulness, nor between inebriety and negligence. This is a view, however, to be taken with the qualification, that while intoxication is not, as a matter of law, to be regarded contributory negligence, it is held that it tends to show negligence on the part of the plaintiff. *Aurora v. Hillman*, 90 Ill. 61; *Illinois, etc., R. R. Co. v. Cragin*, 71 Id. 177; *City of Rock Island v. Vanlandschoot*, 78 Id. 485. 'Intoxication is competent, but not conclusive, evidence of negligence.' *Abbott's Trial Evidence*, 585, § 12, citing *Stuart v. Machiasport*, 48 Me. 477; *Baker v. Portland*, 58 Id. 199; *Wynn v. Allard*, 5 Watts & S. (Pa.) 524. The plaintiff is therefore, on the one hand, entitled to an instruction to the effect that his intoxication is not, as matter of law, contributory negligence or conclusive evidence of such negligence as will prevent a recovery; and the defendant on his part is entitled to an instruction to the effect that the intoxication of the plaintiff is evidence of negligence from which the jury are at liberty to infer such negligence as will bar the action. *Wynn v. Allard*, 5 Watts & S. (Penn.) 524; *Illinois, etc., R. R. Co. v. Cragin*, 71 Ill. 177; *Cleghorn v. New York, etc., R. R. Co.*, 56 N. Y. 44; *People v. Eastwood*, 14 Id. 562; *Wood v. Andes*, 11 Hun (N. Y.), 543; *Cassedy v. Stockbridge*, 21 Vt. 391; *Chicago, etc., R. R. Co. v. Bell*, 70 Ill. 102; *Fitzgerald v. Weston*, 52 Wis. 354; *City of Salina v. Trospen*, 27 Kan. 545. Under the Georgia Code, in certain classes of actions against railway companies, the intoxication of the plaintiff is made

an absolute defence. Code of Ga., § 2772 and § 3034, *cf.* *Southwestern R. R. Co. v. Hankerson*, 61 Ga. 114, but this is counter to current authority. . . . Two of the plaintiff's slaves, being allowed to go about on Sunday as they pleased, became intoxicated; and, wandering upon the defendant's track, lay down and fell asleep at a point upon a straight line in the road where they could be seen from an approaching train for more than a mile. They were, however, run over by a passing train, one of them being killed and the other seriously injured. The plaintiff argued that under these circumstances the law should imply negligence upon the part of the defendant's trainmen, but the court held that position not tenable, but insisted that being upon the track, in a condition of helpless intoxication, was in itself such contributory negligence as would prevent a recovery. *Herring v. Wilmington, etc., R. R. Co.*, 10 Ired. (N.C. L.) 402. This is the rule consistently adhered to by all the courts in actions brought by trespassers upon railway property for injuries sustained in a fit of intoxication. *Denman v. St. Paul, etc., R. R. Co.*, 26 Minn. 357; *McClelland v. Louisville, etc., R. R. Co.*, 94 Ind. 276; s. c., 18 Am. & Eng. R. R. Cas. 260; *Yarnall v. St. Louis, etc., R. R. Co.*, 75 Mo. 575; s. c., 10 Am. & Eng. R. R. Cas. 726; *Little Rock, etc., R. R. Co. v. Pankhurst*, 36 Ark. 371; s. c., 5 Am. & Eng. R. R. Cas. 635; *Houston, etc., R. R. Co. v. Smith*, 52 Tex. 178; *Id. v. Sympkins*, 54 Tex. 615; *Illinois, etc., R. R. Co. v. Hutchinson*, 47 Ill. 408; *Manly v. Wilmington, etc., R. R. Co.*, 74 N. C. 655; *Richardson v. Id.*, 8 Rich. (Law) 120; *Felder v. Louisville, etc., R. R. Co.*, 2 McMull. (S. C.) 408; *Southwestern, etc., R. R. Co. v. Hankerson*, 61 Ga. 114; *Weymire v. Wolff*, 52 Iowa, 548; *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 279." Beach on Contributory Negligence, 391-394.

See note to *Stoner v. Pennsylvania Co.*, *supra*.

## UNION PACIFIC R. R. Co.

v.

DIEHL.

(*Advance Case, Kansas. April 10, 1885.*)

A passenger was injured while stepping on a train after a stoppage for dinner. He brought suit to recover damages. The preponderance of evidence was decidedly to show that the plaintiff was in fault, and that the railroad company was not. There was, however, some evidence to show that the train had not stopped long enough; that it started with a jerk, and that the plaintiff was without fault. Verdict and judgment being entered for the plaintiff. *Held*, that the judgment would not be reversed, although, in the opinion of the court of review, the trial court should have sustained a motion for a new trial, on the ground that the verdict was against the preponderance of evidence.

ERROR from Riley county.

*J. P. Usher* and *Charles Monroe* for plaintiff in error.

*Green & Hessin* for defendant in error.

VALENTINE, J.—This was an action brought in the district court of Riley county, Kansas, by George W. Diehl against the Union Pacific Ry. Co., for the recovery of damages sus-

FACTS.

tained by him while travelling as a passenger on one of the defendant's trains. The damages were alleged to have been caused by the negligent conduct of the defendant in moving its train after it had been stopped at Brookville, on the evening of September 14, 1881, to enable the passengers to leave the train to procure supper. The particular negligence originally specified in the plaintiff's petition, was the failure on the part of the defendant to give any signal or warning that the train was about to be moved; and after the trial of the case, and after a verdict and special findings had been rendered by the jury in favor of the plaintiff and against the defendant, the plaintiff, with leave of the court, amended his petition so as to specify another particular ground of negligence, to wit: the moving of the train "without giving a sufficient time for passengers on said train, who so desired, to alight from said train." Judgment was rendered in the court below, in accordance with the verdict and special findings, in favor of the plaintiff and against the defendant for the sum of \$8000.

The plaintiff in error (defendant below) claims that the action should have been removed, on its application, from the district court of Riley county to the United States <sup>REMOVAL OF</sup> ~~CAUSE.~~ circuit court for trial. The question of removal in such cases, however, has, so far as this court is concerned, already been settled adversely to the views of the plaintiff in error by the decision in the case of *Union Pac. R. R. Co. v. Dyche*, 31 Kan. 120; s. c., 14 Am. & Eng. R. R. Cas. 272. See, also, *Myers v. Union Pacific R. R. Co.*, 3 McCrary, 578. The other questions presented by plaintiff in error (defendant below) are founded solely upon the theory that the general verdict of the jury, and many of their special findings, are not sustained by sufficient evidence.

It appears that the plaintiff below (defendant in error), with his wife and two small children, entered a sleeping-car, forming a part of one of the defendant's trains, at Bunker Hill, in Russell county, for the purpose that all might be transported as passengers on the defendant's railway to Topeka, Kansas. The wife and children rode in the sleeping-car to Brookville. The plaintiff <sup>FACTS.</sup> in the mean time rode in several cars on that train. There was considerable evidence introduced tending to show that the plaintiff was intoxicated, and some that he was not. Probably he was intoxicated; but the jury found that he was not. When the train arrived at Brookville, it is doubtful in what car the plaintiff was riding; but the jury found, upon the conflicting evidence introduced upon the subject, that he was riding in the sleeping-car. The train stopped at Brookville, and it was announced that the train would stop at that place 20 minutes, to enable the passengers to procure their suppers. A preponderance of the evidence clearly tends to show that the train remained stationary at that place for a sufficient length of time to enable the passengers, who desired

to do so, to remove from the train. There was some evidence, however, tending to show otherwise; and the jury found otherwise. A preponderance of the evidence also tends to show that, prior to the starting of the train in motion, after it had stopped, a bell was rung, giving the proper signal, and warning that the train was about to be moved. There was other evidence, however, tending to show the reverse; and the jury found that no such signal or warning was given. There was also evidence, seemingly a preponderance, tending to show that the plaintiff was standing on the platform of one of the cars while the train was moving, and that, while the train was so moving, he attempted to step from such platform onto the depot platform, when he fell and received the injuries complained of. There was evidence, however, tending to show that the train did not move until about the time when the plaintiff was stepping from the car platform to the depot platform. The jury, by its general verdict, found in favor of the plaintiff, and therefore found that the train was not moving while the plaintiff was standing on the car platform, and did not move until the time when he attempted to step therefrom to the depot platform. The evidence was conflicting as to whether the train started to move with a sudden jerk or not. A portion of the evidence tended to show that the train started with a sudden jerk; but probably a preponderance tended to show that the start was not sudden, but was easy and gradual. There was also evidence tending to show that the train, equipped as this train was, and in the condition in which this train with its engine was, could not have been moved backward or forward with a sudden jerk. The jury, however, found in favor of the plaintiff.

Upon all the foregoing questions the evidence was conflicting. It was conflicting as to whether the plaintiff was intoxicated, or not; as to whether he was in the sleeping car, or not, at the time when the train arrived at Brookville; as to whether the train remained stationary, or not, after it stopped at Brookville, for a sufficient length of time to enable the passengers to remove therefrom; as to whether the train started to move without any warning or signal being given for its removal; as to whether it started with a sudden jerk, or not; as to whether the train was in motion before the plaintiff attempted to get off the same, or not; and as to whether there was a stool on the depot platform, or not, on which the plaintiff stepped when he attempted to step from the train.

We think the verdict of the jury in the present case should have been set aside, and a new trial granted. It is the duty of a trial court, whenever the verdict is clearly against the weight or preponderance of the evidence, to set it aside, and grant a new trial. *Williams v. Townsend*, 15 Kan. 564, 570, 571; *Kansas Pac. R. R. Co. v. Kunkel*, 17 Kan. 172; *Brown v. Atchison*,

VERDICT SET  
ASIDE.



T. & S. F. R. R. Co., 31 Kan. 2; s. c., 10 Am. & Eng. R. R. Cas. 739. The supreme court, however, has no such power. Where the evidence is all in parol, and where there is some evidence sustaining every fact necessarily included in the verdict,—not a bare scintilla, but enough evidence, if not contradicted, to prove every such fact,—and where the trial court approves the verdict by refusing to set it aside and by rendering a judgment thereon, the supreme court cannot disturb it, although a preponderance of the evidence may seem to be against the verdict. BUT NOT BY SUPREME COURT. See the above cases, and *Kansas Pac. R. R. Co. v. Richardson*, 25 Kan. 391; s. c., 6 Am. & Eng. R. R. Cas. 96, which is especially applicable to this case; also *Seip v. Patrie*, 19 Kan. 13; *Beal v. Coddling*, 32 Kan. 107. It is, perhaps, unfortunate in many cases that the supreme court has no greater power in reviewing and in setting aside verdicts; for, because of such inability on the part of the supreme court, injustice is sometimes permitted to be done.

While we think that, upon all the evidence in the case, the verdict of the jury should have been in favor of the defendant and against the plaintiff, yet sufficient evidence may be selected from the evidence introduced to make out a pretty strong case in favor of the plaintiff and against the defendant. Evidence may be selected that will show that the plaintiff was not intoxicated at the time when the train arrived at Brookville, but was then in a sober and proper condition; that he was with his wife and children in the sleeping-car when the train stopped; that it was announced by the defendant's employees that the train would remain at that place 20 minutes, to enable passengers to procure supper; that immediately after the train stopped, the plaintiff, with his wife and two children, started to leave the car; that he took one of the children in his arms and a satchel in his hand, and his wife took the other child in her arms, and both started to leave the car; that when he arrived at the platform of the car, he put the child down on such platform; that the train was not then in motion; that he then attempted to step from the car platform onto a stool on the depot platform, but that the train then started backwards with a sudden jerk, without any signal or warning having been given that it was about to be moved; and that that car or the next car struck him, and the stool tumbled over, causing him to fall, and he fell down between the car and depot platform, and one of his legs was caught under the car and so injured as to require amputation. If these things were all true, we would think that the plaintiff was entitled to recover; and for the purposes of this case we must now consider them as true.

The judgment of the court below will be affirmed.

**Recovery of Damages from a Railroad Company by one Injured by Jumping from a Moving Train.**—See *L. S. & Michigan Southern R. R. Co. v. Bangs*, 21 A. & E. R. Cas.—23

3 Am. & Eng. R. R. Cas. 431; also, Cincinnati, etc., R. R. Co. v. Peters, 6 Ibid. 136. The last case and note also discuss the duty of the company to stop its trains a reasonable time to allow passengers to alight.

## MCDONOUGH

v.

## METROPOLITAN R. R. Co.

(137 Massachusetts Reports, 210.)

In an action against a street railway corporation for personal injuries occasioned to the plaintiff, a boy thirteen years and five months old, accustomed to ride in street-cars, in attempting to get upon the front platform of the defendant's car while it was in motion, on the Lord's day, but not to travel for any purpose of necessity or charity, the plaintiff's testimony tended to show that, when he saw the car coming, he, with another boy, left the sidewalk where they had been waiting, crossed the street, and stood by the side of the track; that the car stopped less than two car-lengths from the place of the accident, and started with a tow-horse attached; that the grade was rising; that the horses started on a walk, and, at the time the plaintiff attempted to get upon the platform, were just beginning to trot, or going at a slow trot; that, when the car approached the plaintiff, he signalled the driver to stop; that the driver saw him and turned to speak to the tow-boy, who was on the front platform on the opposite side of the car from the plaintiff; that the plaintiff's companion got upon the front platform; that, as the plaintiff was getting upon it, with one foot upon the step and holding to the railing with both hands, the driver and the tow-boy started up the horses, giving the car a jerk by which the plaintiff's foot was thrown off the step, and, after being dragged a few feet, he fell, receiving the injuries complained of. There was no rule or notice prohibiting the getting on the front platform of the car when in motion. *Held*, that, if the jury found that the driver believed that the plaintiff was getting upon the car, there was sufficient evidence of the defendant's negligence. *Held, also*, that the question whether the plaintiff was in the exercise of due care was for the jury. *Held, also*, that the plaintiff was "travelling," within the Pub. Sts. c. 98, § 3.

TORT for personal injuries occasioned to the plaintiff by the negligence of the defendant. At the trial in the Superior Court, before Rockwell, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

*W. Gaston & E. O. Shepard* for the defendant.

*S. B. Allen & J. P. Farley, Jr.*, for the plaintiff.

W. ALLEN, J.—The plaintiff, a boy of the age of thirteen years and five months, accustomed to ride in horse cars, attempted to get upon the front platform of the defendant's car while it was in motion, and was thrown down and injured; it was upon the Lord's day, and the plaintiff's object in taking the car was to

FACTS.

travel upon it, but not for any purpose of necessity or charity. Three questions are presented in the exceptions: whether there was evidence of negligence in the driver of the car which caused the injury; whether there was evidence that the plaintiff was in the exercise of due care; and whether the plaintiff was a passenger upon the car.

1. The evidence of the plaintiff tended to prove that, when he saw the car coming, he, with another boy, left the sidewalk where they had been waiting, crossed the street, and stood by the side of the track; that the car stopped less than two car-lengths from the place of the accident, and started with a "tow-horse" attached; that the grade was rising; that the horses started on a walk, and, at the time the plaintiff attempted to get upon the platform, were just beginning to trot, or going at a slow trot; that, when the car approached the plaintiff, he signalled the driver to stop; that the driver saw him, and turned to speak to the tow-boy, who was on the front platform on the opposite side of the car from the plaintiff; that the plaintiff's companion got upon the front platform; that, as the plaintiff was getting upon it, with one foot upon the step and holding to the railings with both hands, the driver and the tow-boy started up the horses, giving the car a jerk by which the plaintiff's foot was thrown off the step, and, after being dragged a few feet, he fell and the wheel passed over him.

NEGLIGENCE OF  
DRIVER  
OF  
STREET CAR DIS-  
CUSSED.

The argument for the defendant is, that the only inference the jury could draw from this evidence is that the driver properly refused to stop his car on a rising grade, and signified that to the plaintiff, and had no reason to suppose that the plaintiff would attempt to get upon the front platform. But the jury were not bound to draw that inference; on the contrary, they may have believed, from the evidence, that the driver, knowing that the plaintiff intended to get upon the front platform of the car, instead of forbidding it, started up his horses. There was some evidence that not only the signal to the driver, but the position and movements of the plaintiff at the time, indicated to the driver that the plaintiff intended to step upon the front platform. If the jury found that the driver believed that the plaintiff was getting upon the car, there was sufficient evidence of negligence of the defendant.

2. The defendant contends that the fact that the plaintiff attempted to get upon the front platform of the car while it was in motion should be held by the court as conclusive that he was not in the exercise of due care. There is no rule of law that riding or stepping upon the front platform of a horse-car when in motion is negligent. See *Meesel v. Lynn & Boston R. R.*, 8 Allen, 234; *Cram v. Metropolitan R. R.*, 112 Mass. 38; *Maguire v. Middlesex R. R.*, 115 Mass. 239; *Murphy v. Union R. R.*, 118 Mass. 228; *Wills v. Lynn & Boston R. R.*,

NEGLIGENCE OF  
BOY IN GETTING  
ON FRONT PLAT-  
FORM.

129 Mass. 351; *Fleck v. Union R. R.*, 134 Mass. 480; s. c., 16 Am. & Eng. R. R. Cas. 372.

Whether any particular act of that kind is negligent must depend upon the circumstances attending and characterizing it, and must ordinarily be determined by the judgment of a jury. In this case, where the circumstances are disclosed in the evidence, and there is conflicting testimony in regard to them, and disputed inferences of fact are to be drawn, the court would not be authorized to take the case from the jury, unless the act, as proved by undisputed testimony, is seen to be such that the common judgment of men immediately pronounces it to be negligent.

It does not appear that the act was prohibited by the defendant. There is nothing in the case to show that the defendant did not invite its passengers to enter cars by the front as well as by the rear platform. There was no rule or notice prohibiting it. The platforms were alike fitted for such use, and, as matter of common knowledge, were both used for that purpose, and both occupied by passengers; and the jury might well have found that the public were invited to use both. There was no evidence that passengers were not permitted, and impliedly invited, to get upon the cars when in motion; and such invitation might be implied if cars were commonly used in that way without objection, or if such use were consistent with due care. It is unnecessary to consider what inference in this respect the jury might have drawn, because we think that, upon the whole evidence, the question of the plaintiff's care was for the jury. It is obvious that the mere fact of getting upon the front platform of a horse-car when in motion is not, in the common judgment of men, inconsistent with due care. It would not strike the common mind as necessary to stop a car whenever a conductor or a policeman stepped upon the front platform. There is not, as in the case of steam-cars, any commonly recognized rule of prudent conduct forbidding the act, but the question of due care must be determined by the circumstances and manner of the act, and is a question for the jury, except in those cases where the facts established by undisputed testimony leave no reasonable question. If any facts which may be found by a jury upon the evidence would present a reasonable question whether the plaintiff was not in the exercise of due care, the facts must be passed on by the jury, and the question answered by them.

In the case at bar, there was evidence of many facts bearing upon the character of the plaintiff's act, upon which a jury must pass. The speed at which the car was moving; what reasonable expectation the plaintiff had that the driver would check the speed of the horses, in consequence of the signal and the conduct of the plaintiff; what inference the plaintiff might have drawn from the fact that the driver made no objection and no reply when the plaintiff signified to him his intention to get upon the front plat-

form; the evidence that there were passengers upon the front platform, and that the plaintiff's companion got safely upon it; the number of passengers in the car, and upon the rear platform, as the reason testified to by the plaintiff for not attempting to get upon that; the manner in which the plaintiff attempted to get upon the platform; the manner in which the driver and tow-boy started up the horses, and the cause and manner of the plaintiff's fall; the testimony of the plaintiff as to his familiarity with car riding; his testimony that his act was not dangerous because he took care, and that the horses were going so slow that anybody could get on; the testimony of the driver, that there was no difficulty for some people to get on a car going at the rate of four miles an hour, while there was difficulty for others;—these, without referring to other evidence, were matters which it was for the jury to pass upon and consider, to find the facts, and to draw from the facts found the inference of care or negligence of the plaintiff. We think there was evidence which rendered it a proper question for the jury. The first and second requests for instructions were properly refused.

3. The Pub. Sts. c. 98, § 3, provide that "Whoever travels on the Lord's day, except from necessity or charity, shall WHETHER TRAVELLER WAS PASSENGER. be punished by a fine not exceeding ten dollars for each offence. But the provisions of this section shall not constitute a defence to an action against a common carrier of passengers for a tort or injury suffered by a person so travelling." Upon the undisputed evidence, the plaintiff was travelling upon the defendant's car. The length of time he had been upon the car and his position upon it, and the fact that he was changing his position and had not assumed his seat or taken his stand upon the platform, are immaterial. He was on the car, and being carried by it on his journey. The instruction that, if he was there in the exercise of due care, he had the rights of a passenger, was correct; and, whether required by the facts or not, was sufficiently favorable to the defendant. The tenth instruction asked was properly refused, and the ninth and the eleventh become immaterial.

Exceptions overruled.

**Alighting from or Boarding a Moving Street-car is not per se a Negligent Act.**—The fact that a passenger boarded or alighted from a moving street-car does not ordinarily constitute contributory negligence *in se*. In general it is evidence of contributory negligence to be considered by the jury in the light of all the surrounding circumstances. *Eppendorf v. Brooklyn City, etc., R. R. Co.*, 69 N. Y. 195; *Mettlestadt v. Ninth Ave. R. R. Co.*, 4 Rob. (N. Y.) 377; *Rathbone v. Union R. R. Co.*, 18 R. I. 709; *People's Passenger R. R. Co. of Baltimore v. Green*, 56 Md. 84; s. c., 6 Am. & Eng. R. R. 168; *Mettlestadt v. Ninth Ave. R. R. Co.*, 32 How. Pr. (N. Y.) 428. In the case of *Eppendorf v. Brooklyn City, etc., R. R. Co.*, 69 N. Y. 195, the court say: "Ordinarily it is perfectly safe to get upon a street-car moving slowly, and thousands of people do it every day with perfect safety. But there may be

exceptional cases when the car is moving rapidly, or when the person is infirm and clumsy, or is encumbered with children, packages, or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so, and a court might, upon undisputed evidence, hold as a matter of law that there was negligence in doing so. But in most cases it must be a question for the jury. Here there was nothing exceptional, and no reason apparent why plaintiff might not, with prudence, have expected to enter the car with safety. . . . Upon all the evidence of this case it was for the jury to determine whether the plaintiff was chargeable with negligence, and whether such negligence contributed to the injury." In *People's Passenger R. R. Co. v. Green*, *supra*, the plaintiff was riding on the front platform of a street-car. The car ran off the track, and the plaintiff and other passengers standing with him on the platform got off and helped get the car on the track. When this was done the passengers got on the front platform again by stepping over a guard or enclosure three feet high surrounding the same, and while the plaintiff was in the act of getting on the car in the same manner the driver without any warning started the horses which resulted in the plaintiff being thrown down and injured. *Held*, that plaintiff was not guilty of contributory negligence as a matter of law in trying to get into the car by climbing over the guard.

In some cases it is held to be Contributory Negligence *per se* for a Passenger to get off or on a Street-car while in Motion.—In *Dietrich v. Baltimore, etc., R. R. Co.*, 58 Md. 347, there was access to the platform of a street-car from only one side of the street, entrance on the other side being prevented by a wire-railing. The step to the front platform was broken. The plaintiff attempted to get on the car by means of the front platform instead of by means of the rear platform, by which he properly should have entered the car. In so doing he was injured by reason of the broken step. *Held*, that plaintiff was guilty of contributory negligence as a matter of law, and that the case was properly withdrawn from the jury. In *Guinon v. New York & Harlem R. R. Co.* it was held contributory negligence *in se* for a passenger to attempt to get off the front platform of a street-car while in rapid motion, the passenger being encumbered with a large bundle. *Guinon v. New York & Harlem R. R. Co.*, 3 Rob. (N. Y.) 25. For a note discussing the subject, when the fact that a passenger was riding on the platform of a street-car constitutes contributory negligence, see note to *Camden, etc., R. R. Co. v. Hoosey*, 6 Am. & Eng. R. R. Cas. 460.

## FORTY-SECOND STREET AND GRAND STREET FERRY R. R. Co.

v.

HAYES.

(97 *New York Reports*, 259.)

To maintain an action to recover damages for negligence, plaintiff must prove facts warranting an inference of negligence on the part of defendant; he may not recover upon facts as consistent with care and prudence as with the opposite.

Plaintiff's evidence in such an action was to the effect that he went upon one of the defendant's street-cars and stood upon the front platform, although there were vacant seats inside. The car stopped to receive other passengers,

who entered by the front platform; to facilitate their entry, plaintiff stepped down upon the front step; as he was stepping up again, as he testified, "the car gave a sudden movement and pulled up," and he was thrown off and injured. It appeared that, after starting, the car did not stop until after the accident. *Held*, that the evidence failed to show any negligence on defendant's part; and that a refusal to nonsuit was error.

As to whether the provision of the General Railroad Act (§ 46, chap. 140, Laws 1850), relieving a railroad company from liability for injuries received by a passenger on the platform of a car, when it posts a notice in the car warning passengers against so riding, and furnishes a seat in the car for the passenger, *quære*.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made the second Monday of December, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been caused by the negligence of the driver of one of the defendant's street-cars.

The material facts are stated in the opinion.

*Freling H. Smith* for appellant.

*H. D. Birdsall* for respondent.

FINCH, J.—The defendant company makes two objections to the recovery in this case. Upon proof that the notice required by the General Railroad Act was posted in the car, and that plaintiff was riding upon the platform and was upon the step when injured, in disregard of that notice, his contributory negligence was asserted. In *Nolan v. Brooklyn City & Newtown R. R. Co.* (87 N. Y. 63; s. c., 3 Am. & Eng. R. R. Cas. 463) we did not decide that the provision of the General Railroad Act referred to applied to street railroads. It was enough in that case, that if it did, the notice proved was insufficient, and and that was the only answer deemed necessary to the argument founded upon the statute. Nor need we decide that question now, since we think the second objection taken by the appellant, that there was no evidence of negligence on the part of the defendant company, is well founded.

RIDING ON PLATFORM, WHETHER NEGLIGENCE.

On New Year's day of 1881, the plaintiff, after having partaken liberally of intoxicating drinks, but claiming, nevertheless, to have been entirely sober, went upon a street-car of defendant at Forty-second Street, in the city of New York, for the purpose of riding down town. He took his position upon the front platform when there was room and were vacant seats inside of the car; while thus riding on the platform his fare was collected by the conductor, without remonstrance or objection.

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The car stopped at Twenty-third Street to permit four persons to come upon it as passengers, one of whom was a lady, and all of

whom entered by way of the front platform. The plaintiff stepped down upon the front step, as he says, "to give these passengers better facility for getting in," and then, he adds: "I was in the act of stepping up again, after they got on the front platform, when the car gave a sudden movement and pulled up, and I got thrown out sideways." This is the sole and only evidence upon which any negligence of the company can be founded. What the plaintiff said about an elevation of the rail along the curve he admitted might have been the riser or flange upon which the wheels do not run, and that such was the case was proved beyond any possibility of doubt. It is not shown that the driver of the car started his horses in any unusual or negligent manner. The plaintiff does not so testify, and standing where he did, upon the front platform, it was possible for him to see and observe. That the car "gave a sudden movement" is entirely consistent with the supposition that, having been still, the horses were started in a careful and prudent manner; for a car loaded with passengers must necessarily require a strong pull of the horses to overcome its resisting inertia, and such must be a thing of constant occurrence and unavoidable. The strong effort of starting relaxes as momentum is gained, and the car moves easily, and this is what the plaintiff evidently means by the phrase "and pulled up," unless he refers to its stoppage after he fell off, for it is entirely certain that, after starting, the car did not stop until the accident had occurred, and stopped on account of that. The plaintiff, therefore, gave no evidence which even tended to show that there was any negligence on the part of the company. He must prove something which warrants that inference, and not leave his case upon facts just as consistent with care and prudence as with the opposite. *Baulec v. N. Y. & Harlem R. R. Co.*, 59 N. Y. 357.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except DANFORTH, J., dissenting, and RAPALLO, J., absent.

Judgment reversed.

**Whether it is Contributory Negligence for a Passenger on a Street-car to Ride on the Platform.**—See Notes to *Alabama Great Southern R. R. Co. v. Hawk*, 18 Am. & Eng. R. R. Cas. 201; *Germantown Passenger R. R. Co. v. Walling*, 2 Am. & Eng. R. R. Cas. 26.



## BUCHER

v.

## NEW YORK CENTRAL AND HUDSON RIVER R. R. Co.

(98 *New York Reports*, 128.)

It is culpable negligence on the part of a railroad corporation not to stop a train entirely at a regular station to which it has sold a ticket, and give a passenger time and opportunity to alight. It is also negligence for its officers to induce a passenger to leave a train while in motion.

It is not negligence *per se* for the passenger to leave the train while in motion; if he is told by the conductor to get off, or given by him to understand that he can do so in safety, and the surrounding circumstances are such as to give him reason to believe he may, he is justified in making the attempt.

In an action, therefore, to recover damages where a passenger is injured in attempting to leave the train while in motion, and evidence is given tending to prove such instructions and circumstances, the question of contributory negligence is one of fact for the jury.

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made July 11, 1882, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting the plaintiff on trial.

This action was brought to recover damages for injuries alleged to have been occasioned by defendant's negligence.

Plaintiff was a passenger on a train on defendant's road, and, in attempting to leave the train at the station to which he had bought a ticket, was injured.

The further facts, so far as material to the questions discussed, are stated in the opinion.

*Frank R. Perkins* for appellant.

*George C. Green* for respondent.

MILLER, J.—Upon the close of plaintiff's testimony on the trial of this action, the defendant's counsel moved for a non-FACTS. suit upon two grounds: First, that the evidence showed no negligence on the part of the defendant. Second, that the evidence showed negligence on the part of the plaintiff which contributed to the injury. The plaintiff's counsel asked to go to the jury upon these questions; this request was refused and the motion for a nonsuit granted, and an exception taken to the ruling by the plaintiff's counsel.

As the evidence stands there can be, we think, no serious question in regard to the defendant's negligence. It appears that the train did not stop at the station for NEGLIGENCE NOT TO STOP AT STATION.

which the plaintiff had purchased a ticket, and at which he had a right to get off. It was the custom to stop there, but, for some unexplained reason, when it arrived, instead of stopping as it should have done, the train merely slowed up and thus did not furnish the plaintiff an opportunity to leave the cars in accordance with defendant's contract with him. This was clearly negligence, but there is also evidence to show, as will hereafter be manifest, that the conductor used language to the plaintiff which authorized the conclusion that he had a right to get off the train and that he could do so under the conductor's direction. The rule is well established that it is culpable negligence on the part of a railroad corporation for its officers to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes him not to stop the train entirely and give the passenger ample time and opportunity to alight. *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 51.

It may be added that there was also evidence which tended to show that a signal was given by the conductor to put the train in motion while the plaintiff was getting off and without warning to him. If this was established it tended to show negligence on the part of the defendant, *Keating v. N. Y. C. & H. R. R. R. Co.*, 49 N. Y. 673. As the testimony stood it was for the jury to determine whether there was any proof of negligence on the part of the defendant, and the court should have submitted the case to their consideration on that question, unless it distinctly appeared that the plaintiff was chargeable with negligence contributing to the injury.

As to the plaintiff's negligence, that also was a question for the jury to decide. It appears that the plaintiff had purchased a ticket from Buffalo to Getzville where the train was accustomed to stop. As the train approached this station, where the plaintiff intended to and had a right to leave the cars, the speed was reduced until the train came nearly to a stop. The plaintiff prepared to leave and, with a little child in his arms, proceeded to the car platform for that purpose. According to his testimony the conductor, who was standing on the platform of the station, called to him and said, "you want to clear off here," and he answered he wanted to get off, and the conductor told him to step off, or get off, or jump off, he didn't know which. The train was then in motion and he got off on the right side of the car, taking hold of the rail on the right side of the car platform with his left hand; he then stepped off with his right foot first and was twisted around; he thought the train had stopped the same minute he stepped off, but was mistaken as he felt it was going and he was jerked around; the conductor took hold of him and they tumbled off the platform of the station together. On his cross-examination, after testifying in substance, in reference to what passed between him and the conductor, the same as on his

GETTING OFF  
MOVING TRAIN—  
BY ORDER OF  
CONDUCTOR—EM-  
ERGENCY—  
NEGLECTANCE.

direct examination, the question was put to him, "was not all he said, do you want to get off?" and he answered: "He asked me, do you want to get off; I said yes. He asked me twice, do you want to get off." His testimony varies on his cross-examination as to the train stopping when he got off. He testified he did not know the train was going when he got off, or he thought it had stopped, and then he swore that when he was in the act of getting off he saw it had not stopped, thus contradicting his former evidence.

Wolkert, a witness for the plaintiff, testified that he saw the plaintiff get off the train; that he saw the conductor, before the plaintiff got out of the car, motioning the fireman in the cab to go ahead; that the conductor saw the plaintiff and told him to get off. He also swore that the plaintiff went backwards about a rod along the platform holding on to the railing and that he was torn away by the conductor. He afterward stated on cross-examination that the conductor asked the plaintiff if he wanted to get off.

From the statement we have given of the testimony there was certainly some evidence to show that previous to the conversation between the plaintiff and the conductor, the latter had given notice for the train to proceed, and that he had either told the plaintiff to get off, or given him to understand, from what he said, that he could get off, and under the circumstances it was for the jury to say, whether any such directions were given by the conductor as authorized the plaintiff to get off the cars at that time, or made him chargeable with contributory negligence for so doing. The plaintiff was called upon to act on a sudden emergency, and under such circumstances should not be held to the most rigid accountability for his action. *Salter v. Utica & Black River R. R. Co.*, 88 N. Y. 49; s. c., 8 Am. & Eng. R. R. Cas. 437; *Filer v. N. Y. C. R. R. Co.*, 49 Id. 52. If the plaintiff had reason to believe, from what passed between him and the conductor, and from the surrounding circumstances, that it was safe and prudent for him to leave as he did, then he was justified within the authorities last cited. Whether the facts warranted this conclusion was a fair question which should have been submitted to the jury.

The defendant's counsel claims that the conduct of the plaintiff when he left the car, in taking hold of the railing at his right side with his left hand, thus bringing his back in the direction in which the train was moving, and retaining his hold and walking backwards about a rod until the conductor pulled him away, was negligence and the cause of and contributed to the injury. While these facts were a proper subject for consideration in determining the question as to plaintiff's negligence, they are by no means conclusive. Plaintiff had a right to leave the cars at that place, and in attempting to do so was evidently embarrassed by the train going on instead of stopping. If he supposed it had stopped, and

had reason to do so as he testified on his direct examination, then there was nothing in the manner of his undertaking to get off which indicated carelessness on his part. If he was notified, as is claimed, to get off, then he had a right to assume that it was safe to do so, and he was not negligent in acting as he did. The question as to his contributory negligence in this respect was, therefore, not a question of law, but one of fact. Whether the plaintiff was asked by the conductor if he wished to get off, or whether the conductor told him to get off, is not very important, as either remark, under the circumstances, might be regarded as a notification to him to leave the cars. As this was a regular stopping-place for the train, and as the plaintiff had a right to suppose the cars were going to stop, any intimation to him to that effect might, perhaps, in view of the facts, be regarded as sufficient to justify him in doing as he did.

We think it is clear that the case should have been submitted to the jury, and that the court erred in granting the nonsuit.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

As to Contributory Negligence of Passenger in Jumping off Train while Moving—see *L. S. & Michigan Southern R. R. Co. v. Bangs*, 3 Am. & Eng. R. R. Cas. 431; *Pennsylvania Co. v. Hoagland*, Ibid. 443; *Commonwealth v. Boston & Maine R. R. Co.*, 1 Ibid. 460, and notes.

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Boss

v.

PROVIDENCE AND WORCESTER R. R. CO.

(*Advance Case, Rhode Island. July 25, 1885.*)

B. took passage on a dark night, on defendant's train, from Providence to Pawtucket, where he resided. The train, when about 600 feet from the Pawtucket station, stopped to let a freight train pass. No notice that the train had not reached the station was given in the car where B. was riding, and many passengers started to leave the train. B., supposing he had reached the station, immediately alighted, and in attempting to cross the track in the direction of his home, was struck by the engine of the freight train, and badly injured. It was customary for passengers to board and leave the train at Pawtucket on either side, and B. had been in the habit of getting off the side from which he alighted on the occasion of the accident. As soon as the conductor ascertained the cause of the stop, he moved the train slowly to the station. *Held*, in an action by B. against the railroad company, that the question of the defendant's negligence, and of B.'s contributory negligence, was a question of fact for the jury.

PETITION for new trial.

*Oscar Lapham and Simon S. Lapham* for plaintiff.

*Edwin Metcalf, Nicholas Van Slyck, and Stephen O. Edwards* for defendant.

TILLINGHAST, J.—This is a petition for new trial on the grounds that the verdict is against the evidence and the weight thereof, and that the damages found by the jury are excessive. FACTS. The main facts in the case are not in dispute, and are substantially as follows, viz.: The plaintiff, who resides at Pawtucket, was a passenger on defendant's road from Providence to Pawtucket on the night of January 2, 1883, leaving Providence in the 6:10 P.M. train, which was due at Pawtucket at 6:22 P.M. The train, which consisted of five cars, ran on the west track going out, and as it approached the Dexter street crossing, which is about 600 feet south of the Pawtucket station, which is on the west side of the track, it was signaled to stop by a crossing tender of the road, and did stop. When it came to a standstill the engine and one car had passed over said Dexter street crossing, the remainder of the train being over and immediately to the south thereof. A freight train on the east track was about to pass the Pawtucket station going south, and the signal to the passenger train to stop was given to prevent the latter from reaching the station at the time when said freight train was passing the same, and to avoid the consequent liability to accident on the part of the passengers. No notice was given in the smoking car that the train had not arrived at the station. Directly upon the stopping of the train, the plaintiff, who occupied a seat near to the forward door of this car, which was next to the engine, went to the front platform, and, having alighted, attempted to cross the east track of said road, going in the direction of his home. In the act of crossing he was struck by the engine of said freight train, knocked down, his right leg so badly injured that it had to be amputated just below the knee, and other injuries inflicted. The cars were well filled with passengers at the time of the accident, quite a number of whom were for Pawtucket; and, when the train stopped as aforesaid, many of them, supposing that they had arrived at the station, arose from their seats, and started to leave the cars. The plaintiff testified upon this point as follows: "There are two tracks laid side by side. George Brown was with me. . . . Finally the train stopped, and I thought we had got to the depot. Judging by the time, I thought it was just about time to get to the Pawtucket depot. I never thought anything about Dexter Street, for I had never stopped there before. I thought I was at the depot, and felt perfectly safe in getting out. . . . That is the side I always get off at. . . . I got out the same as I always had at the depot. It was dark, and I could not see what there was in front

of me. It is just the common distance between the two tracks."

It was and long had been the custom for passengers to board and leave trains at the Pawtucket station on either side thereof, without caution or restriction from the officers or servants of the road; and passengers alighting from a train at said station, on the east side of a train going north, would necessarily descend upon the ground, there being no platform between the tracks, and would cross the east track, which is the one used by inward, Providence-bound trains. There were platforms on each side of the double track at the station, the one on the east side, however, being very short, and used mainly in the handling of baggage; but it frequently happened that they were not of sufficient length to accommodate the entire trains stopping there, in which cases passengers in the extreme front and rear cars descending upon either side thereof would frequently alight upon the ground. The train in which plaintiff was a passenger was on time, and it had never before stopped, so far as the employees of the defendant knew, at said Dexter Street crossing. One of the printed rules of the road provided that "when a passenger and freight train approach a station at the same time, the freight train must always be stopped before reaching it and wait for the passenger train, and no switching will be done until it has passed." Said rules took effect January 1, 1879. But since then the road has been provided with electric signals, and, to meet this new condition of things, the superintendent has, from time to time, supplemented and varied these rules and regulations by personal instructions given to the employees of the company. At the time of the accident both trains and the crossings were in charge of the usual number of careful, competent, and experienced officials, and the gates at said Dexter Street crossing were closed, and furnished with the lights ordinarily used at such places. The conductor of the passenger train had no warning of the intended stop or the cause thereof. He proceeded promptly to ascertain the cause, and, having done so, caused his train to move forward slowly to the station. The stop at said crossing was but momentary. The engine on the freight train carried a head-light, which lighted the track in front for a considerable distance. There was a curve in the road, however, at and near to said Dexter Street crossing which prevented said head-light, to some extent, from lighting the track where the accident occurred. Said freight train was running at the rate of about 15 miles per hour, and both the engineer and fireman thereon saw the plaintiff on the track before he was struck; but it was impossible then to stop the train or lessen its speed before it struck him. The plaintiff was well acquainted with the surroundings at said crossing and at the station, having been on the police force of the town for

several years, and had frequently been a passenger on defendant's road between Providence and Pawtucket.

There is some conflict of testimony as to whether it was cloudy and foggy at the time of the accident; but it was dark, and there was no moon. The witness Sewell Read testified upon this point as follows: "It was a very dark night; that is, it was misty. It is just as dark when you get opposite the depot as it is there [place of the accident]. . . . Going on the opposite side from the depot you are going into total darkness. There is a light on Exchange Street, clear at the corner of the bridge, but you could not tell by that, I should think."

The jury found for the plaintiff, and assessed the damages at \$6,000.

The defendant contends—First, that upon this state of facts there is no evidence of negligence on its part; and, second, that there is evidence of gross carelessness on the part of the plaintiff.

In regard to the degree of care which the law imposes upon common carriers of passengers, it is settled by a long and uninterrupted line of adjudications that they are bound to exercise the utmost care and skill which prudent men would use under similar circumstances, and that they are liable for injuries resulting from even the slightest negligence on the part of themselves or their servants. *Weed v. Panama R. R. Co.*, 5 Duer, 193; *Maverick v. Eighth Ave. R. R. Co.*, 36 N. Y. 378; *Caldwell v. Murphy*, 1 Duer, 233; *Edwards v. Lord*, 49 Me. 279; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Derwort v. Loomer*, 21 Conn. 245; *Simmons v. New Bedford Steamboat Co.*, 97 Mass. 361; *McElroy v. Nashua & Lowell R. R. Corp.*, 4 Cnsh. 400; *Ingalls v. Bills*, 9 Metc. 1, and cases there cited; *Stokes v. Saltonstall*, 13 Pet. 181, 191; *Bowen v. New York Cent. R. R. Co.*, 18 N. Y. 408; *Thayer v. St. Louis & A., etc., R. R. Co.*, 22 Ind. 26; *Chicago, etc., R. R. Co. v. George*, 19 Ill. 510; *Virginia Cent. R. R. Co. v. Sanger*, 15 Grat. 230; *Nashville & C. R. R. Co. v. Messino*, 1 Sneed, 220.

It is also equally well settled that the question as to whether or not the defendant in a given case is chargeable with negligence is ordinarily a question of fact to be determined by the jury, under proper instructions from the court as to what constitutes negligence. And the same is true in regard to contributory negligence on the part of the plaintiff. And, although there are cases in which, the facts being undisputed, and being decisive of the case, it becomes the duty of the court to decide, as matter of law, upon the question of negligence, yet it is only in those cases where the question of fact is entirely free from doubt, and where only one conclusion can be fairly arrived at therefrom, that the court has the right to thus apply the law without the action of the jury.

DEGREE OF CARE  
REQUIRED OF  
PASSENGER CAR-  
RIERS.

NEGLECTANCE TO  
BE DETERMINED  
BY THE JURY.

WHEN FOR  
COURT TO DE-  
CIDE.

In the language of the court in *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622, cited in defendant's brief: "When, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and may be differently made by different minds, it is for the jury to make them; that is to say, when the process is to be had at a trial of ascertaining whether one fact had being from the existence of another fact, it is for the jury to go through with that process." Or, as is tersely said by Cooley, C. J., in *Detroit & M. R. R. Co. v. Van Steinburg*, 17 Mich. 99, 122, also cited by defendant: "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ." See, also, *Bernhardt v. Rensselaer & S. R. R. Co.*, 32 Barb. 165; *Shear. & R. Neg.* § 11, and notes; *Keller v. New York Cent. R. R. Co.*, 2 Abb. Dec. 480; *Ireland v. Oswego, etc., P. R. R. Co.*, 13 N. Y. 526, 533; *Wells, Law & Fact*, § 265, and authorities cited.

The case at bar, in our judgment, is not one in which the court, sitting with a jury, could pass upon the question of negligence as matter of law. For, while the main facts therein are not in dispute, yet the inferences and deductions to be drawn therefrom are not so manifest and apparent as to warrant the court in declaring them. They were therefore properly left to the jury, and, we are bound to presume, under as favorable a construction of the law as the defendant was entitled to. For, represented as it was at the jury trial by able and diligent counsel, it made no objection that the law applicable to the facts in proof was not fully and clearly stated. The jury found for the plaintiff, and the only question now is whether that finding was clearly, palpably, and decidedly against the evidence and the weight thereof; or, in other words, whether the evidence very strongly preponderates against the verdict. *Johnson v. Blanchard*, 5 R. I. 24, 25. If so, the court should set it aside; but if not so, it should not be disturbed. Upon a careful study of all the evidence, and the law applicable thereto, we are unable to say that there is a very strong preponderance of evidence against the verdict.

There were many facts and circumstances connected with the case which it was the peculiar province of the jury to weigh and consider, and from which it was their prerogative to draw such inferences as, in their good judgment, they might legitimately and fairly draw. For instance, we think that the question as to whether the defendant was guilty of negligence in stopping the train so near the station in the night-time without notifying the passengers



in this car that they had not reached it, considering the imminency of the approaching freight train, was one which the jury might properly consider and pass upon. *Pennsylvania Co. v. Hoagland*, 78 Ind. 203; *Lewis v. Eastern R. R.*, 60 N. H. 187; *Robinson v. New York Cent. & H. R. R. Co.*, 20 Blatchf. 338; s. c., 9 Fed. Rep. 877. And as different minds would doubtless arrive at different conclusions, and that, too, with entire honesty and fairness, upon the evidence as to that question, it would be simply substituting the court for the jury if it should say that they were not warranted in finding that there was negligence on the part of the defendant from this one fact. And the same is true with regard to several other facts which appeared in evidence, namely, allowing the freight train to pass the station when the passenger train was due, thereby necessitating the stoppage of the latter so near to the station, with knowledge on the part of the defendant that passengers were in the habit of leaving the train on both sides thereof the moment it arrived at the station, and that when the trains were long, as frequently was the case, passengers in the smoking car would be obliged to alight upon the ground for want of sufficient length of platform, and this, too, where there were no lights.

These facts, together with others of more or less importance, were before the jury for consideration, under the instruction of the court as to the law applicable thereto, and they arrived at the conclusion that the defendant was guilty of negligence. And it is quite immaterial that the court, if originally acting as the triers of this question of fact, might have come to a different conclusion. It is immaterial even that another jury might arrive at a different conclusion upon the same proof, so long as no claim is made that the jury that tried the case was actuated by improper motives, or was not a fit and proper jury in every respect to try the same.

As to the claim made by defendant, that the accident resulted from the plaintiff's carelessness, it seems to us that the only reply which the court need make is, that while CONTRIBUTORY NEGLIGENCE, JURY TO JUDGE OF. unquestionably there was evidence tending to prove this, yet it was for the jury to say whether it was proved as matter of fact under the law as given by the court; in other words, that the evidence of carelessness on his part was not so conclusive and free from doubt as to warrant the court in deciding, as a matter of law, that he was guilty of contributory negligence, or that the finding of the jury upon that question was against the strong preponderance of the evidence.

In *Hoyt v. City of Hndson*, 41 Wis. 105, it was held that if the plaintiff's evidence merely tends to show negligence on his part, it is for the jury to say whether it existed. See, also, *Manufacturing Co. v. Morrissey*, 40 Ohio St. 151; *Fassett v. Roxbury*, 55 Vt. 552. 555; *Longenecker v. Pennsylvania R. R. Co.*, 105 Pa. St. 328; *Dahlberg v. Minneapolis Street Ry. Co.*, 32 Minn. 404; s. c., 18 Am. &

Eng. R. R. Cas. 202; *Scott v. Dublin & W. Ry.*, 11 Ir. C. L. R. 377; *Beisiegel v. New York Cent. R. R. Co.*, 34 N. Y. 622; *Bowers v. Union Pac. R. R. Co.*, 20 Reporter, 58; *Hoye v. Chicago, etc., R. R. Co.* 19 Am. & Eng. R. R. Cas. 347. Several of the cases cited by the defendant as bearing upon the question of the plaintiff's carelessness,—namely, *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102; *Wheelwright v. Boston & A. R. R. Co.*, 135 Mass. 225; 16 Am. & Eng. R. R. Cas. 315; *Stubley v. London & N. W. Ry. Co.*, L. R. 1 Exch. 13; *Ernst v. Hudson River R. R. Co.*, 36 How. Pr. 84, and *Whart. Neg.* § 384,—are cases in which the persons injured were not passengers on the trains from which they received the injury, but simply travelers in the act of crossing or walking upon the railroad track. But, as a very different rule of responsibility obtains where an accident occurs during the existence of the relation of passengers and common carriers from that which obtains under the former circumstances, we do not think that these cases have much bearing upon the one under consideration. The case of *Bridges v. North London Ry. Co.*, L. R. 6 Q. B. 377, cited in defendant's brief, would seem greatly to strengthen their position; but as this case was subsequently reversed by the House of Lords (see *Bridges v. Directors, etc., of N. L. Ry. Co.*, L. R. 7 H. L. 213), it is not an authority. Mr. Justice Brett, one of the judges summoned by the House of Lords to give an opinion in the case, said, among other things: "What men of ordinary care and skill would or would not do under certain circumstances is matter of experience, and so of fact, which a jury only ought to determine. It seems to me that it will aid the consideration of what is the proposition or rule of law which is to govern the determination of a judge whether there is or is not evidence fit to be left to a jury, to consider what duty, with regard to facts, is cast upon the judge after the jury has found a verdict. He must, undoubtedly determine whether the verdict is against the weight of the evidence. Here, again, I think that a definite rule of conduct,—or, in other words, a definite proposition for legal application, which is, I think, a proposition of law to be applied to the facts in evidence,—should be laid down. That proposition cannot be whether the judge agrees in opinion with the jury. If so, the judge has left to the jury evidence which he has already decided to be such as it is not unreasonable to act upon, and yet, when it is acted on, he overrules it. I do not speak here of the cases in which a judge may, for precaution's sake, leave matter to the jury, reserving for more careful consideration by the court the question whether there was evidence fit to be left to the jury. The proposition or rule of conduct to be applied to the consideration of the verdict seems to me to be identical with that to be applied to the evidence before leaving the case to the jury. It is, again, not whether the judge would have decided in the same way, but whether the verdict is such as reasonable and fair men

might not unfairly arrive at ; or, in other words, whether the decision is such as would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men."

The following-named cases cited by the defendant, namely, *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; *Gonzales v. New York & H. R. R. Co.*, 38 N. Y. 440; *Chicago, R. I. & P. R. R. Co. v. Dingman*, 1 Bradw. 165; *Bancroft v. Boston & W. R. R. Corp.*, 97 Mass. 275, in so far as the facts were similar to those in the case at bar, are analogous, and seem to support the position taken by the defendant. But as the facts and circumstances in cases of this sort are so well-nigh infinite in their variety, and as each case must depend almost entirely upon the facts which appear in connection therewith, authorities, however pertinent, are useful mainly only in so far as they settle general propositions of law, and assist the court in applying these propositions to the particular facts of the case before it. While, therefore, not assuming to say, that the law as applicable to the facts in said cases, respectively, was not correctly enunciated, still we are not prepared to say that the law is so applicable to the facts in the case at bar as to control in the decision thereof.

The second ground upon which the defendant asks for a new trial is that the damages found by the jury are excessive. This ground was not urged, however, at the hearing ; and even if it had been, we do not think the court could properly say that, under the evidence as to the extent and permanency of the injury, the jury was influenced by passion, partiality, or prejudice, in assessing the damages, or that the amount is so manifestly excessive and unreasonable as to warrant the interference of the court. See *Sedg. Dam.* (6th ed.) 762-764, and notes ; *Hil. New Trials* (2d ed.), 562-564, §§ 2, 3, 3a, and notes.

The petition for a new trial must be dismissed.

See notes to *Pennsylvania Co. v. Hoagland*, 3 Am. & Eng. R. R. Cas. 440; and *Mitchell v. Grand Trunk R. R. Co.*, 18 Am. & Eng. R. R. Cas. 179.

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## HANNIBAL AND ST. JOSEPH R. R. Co.

v.

CLOTWORTHY.

(80 *Missouri Reports*, 290.)

1. Where evidence is presented on both sides tending in any degree to establish the respective theories of plaintiff and defendant, it is error to take the case from the jury by instruction.

2. If a train does not stop, an attempt of a passenger to get off would, perhaps, constitute such contributory negligence as would preclude a recovery.

But, if it stops for a moment, or moves so slowly as to be almost imperceptible, it will be for the jury to say whether it is such negligence as will preclude a recovery.

8. Where a train stops long enough for a passenger to conveniently get off, and, without the fault of the company's servants, he fails to do so, and the conductor, not knowing and having no reason to suspect that he is in the act of alighting, causes the train to start while he is so alighting, the company will not be liable.

**APPEAL from Macon Circuit Court.**

*Geo. W. Easley* for appellant.

*W. H. Sears*, with *Dysart & Mitchell*, for respondent.

EWING, C.—Suit for damages for personal injury by being thrown from a car by negligent and careless starting of the train before plaintiff could get off. That the train stopped too short a time for plaintiff to get off safely. That as soon as the train stopped plaintiff, with all due diligence, proceeded to get off, but before she could reach the platform the train suddenly started, whereby plaintiff was violently thrown upon the platform, by reason of which carelessness, etc., plaintiff was "greatly wounded, bruised, hurt, and made sick, as well as greatly frightened and terrified, and continues to suffer great pain and distress by reason of the wounds and bruises so received." The answer was a general denial after admitting the incorporation of the defendant. There was a verdict and judgment for the plaintiff for \$1,000, and the defendant appeals to this court.

The plaintiff asked three instructions, as follows:

1. If the jury believe from the evidence that the plaintiff was a passenger on defendant's cars, and that said cars were stopped at a station for the purpose of letting plaintiff and other passengers get off the cars, and that plaintiff proceeded to get off the cars when the train stopped, but that defendant's agents and employees started and put said train in motion before plaintiff had time to get off, and while she was in the act of getting off, whereby she was thrown down and damaged, then they should find for the plaintiff.

2. If the defendant's agents and employees stopped the train at a station, and plaintiff started to get off, then it was negligence in defendant to start said train before she got clear of the cars, upon the depot platform.

3. In assessing the damages, the jury are not restricted to the mere pecuniary loss. They should take into consideration the age and situation of the plaintiff, her bodily suffering and mental anguish resulting from the injury received, the extent and permanency of her injury, and the extent to which she is disabled to make a support for herself and family, but in no case should the damage exceed \$5,000.

The court then, on its own motion, gave instructions four and five, to-wit:

4. If the jury believe from the evidence the plaintiff attempted to get off the train while it was in motion, then she was guilty of such negligence as to preclude her recovery in this action, no matter whether the train stopped at all, or only for a moment.

5. But if the jury believe from the evidence the train came to a full stop, and that while the plaintiff was in the act of getting off, without notice or warning, it started before giving her reasonable time to get off, and injured her, then the jury should find a verdict for plaintiff.

The defendant offered no evidence, and when plaintiff rested asked the court to instruct the jury that, "admitting all the evidence offered by the plaintiff to be true, the verdict must be for the defendant."

I. The appellant insists that the judgment must be reversed for failure to give this instruction: That the evidence shows that the train did not stop at all, and if so, the plaintiff was guilty of such contributory negligence as will preclude her recovery; or if it did stop, it stopped one minute, which was a sufficient length of time for plaintiff to get off safely. The evidence tends strongly to prove that the train did stop; that it came to a stand-still, but started immediately; one witness swearing that the conductor "jumped off with his face west, and he jumped off in a kind of a run and threw up his hands and halloosed 'all aboard.' At that time he was five or six feet west of her." This same witness also said he had seen the train stop there many times, and on this occasion "it did not stop the usual length of time." The evidence is somewhat conflicting as to whether the train stopped or not, but all agree that the halt or stop was a very brief and unusual one. There was ample evidence on this question to go to the jury, and the court did not err in overruling the demurrer. *Kelly v. Hann. & St. J. R. R. Co.*, 70 Mo. 604; *Cook v. Hann. & St. J. R. R. Co.*, 63 Mo. 398; *Tutt v. Cloney*, 62 Mo. 116; *St. Vrain v. Columbia, etc., Co.*, 56 Mo. 590.

II. The first instruction given to the plaintiff is not objectionable. It fairly submitted to the jury the questions they were to consider. The fourth given on motion of the court is broader against the plaintiff than is warranted by the law. If the train did not stop at all, or make a halt, an attempt of a passenger to get off would, perhaps, constitute such negligence as would preclude a recovery. But if it stopped only for a moment, and was moving so slightly, as to be almost imperceptible, then it would be for the jury to say whether it was such negligence as would preclude a recovery. *Straus v. K. C., St. J. & C. B. R. R. Co.*, 75 Mo. 185; s. c., 6 Am. & Eng. R. R. Cas. 384, and authorities there cited; *Swigert v. Hann. & St. J. R. R. Co.*, 75

Mo. 475; s. c., 9 Am. & Eng. R. R. Cas. 322. The fifth instruction given on motion of the court is rather ambiguous. It ought to show more clearly that plaintiff proceeded to get off when the train stopped, and that reasonable time, under all the circumstances, was not given from the time the train came to a halt. These instructions are, perhaps, not fatally defective, but in the event of a new trial it would be well that the views of this court be understood. *Swigert v. Hann. & St. J. R. R. Co., supra*; *Straus v. Kansas City, St. J. & C. B. R. R. Co., supra*.

The second instruction given for the plaintiff is fatally defective. We understand the rule to be that "if the train was stopped a sufficient length of time for the plaintiff to conveniently alight, and without fault of defendant's servants, she failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was in the act of alighting, caused the train to start while she was so alighting, then the defendant would not be liable." *Straus v. Kansas City, St. J. & C. B. R. R. Co., supra*. The second instruction ignores these conditions altogether, but announces the broad doctrine that if the train stopped and plaintiff undertook to get off, it was negligence to start the train before she got off. This is not the law. This instruction must be qualified.

The judgment is reversed and the cause remanded for the error of giving the second instruction. All concur.

See note to Union Pacific R. R. Co. v. Diehl, *supra*.

## MEMPHIS AND LITTLE ROCK R. R. CO., AS REORGANIZED,

v.

STRINGFELLOW.

(44 Arkansas Reports, 82.)

A railroad corporation is not liable for the negligence of the servant of a receiver who is operating the road. His possession is not theirs, and they cannot control either him or his employees.

Where a complaint for a tort shows no liability as to part of the defendants, a general verdict and judgment against all will be arrested as to those not liable, and stand as to the others.

A passenger upon a railroad train, at night, heard the brakeman call out the name of his station. Shortly after the train stopped. The passenger, supposing he had arrived, went out on the platform, but saw no sign of a station. The train had, in fact, stopped short of the station. Shortly afterwards the train started slowly ahead towards the station. The passenger, supposing that he was being carried past his destination, stepped off, and was injured. In an action against the company to recover damages held, that the question of negligence was for the jury.

Party received severe cut on head, leaving permanent scar, and had ends

of his fingers on one hand mashed off. He was in bed four weeks, and disabled from working four months. He suffered much pain and incurred an expense in medical attendance, and medicine of between \$25 and \$85. He could ordinarily earn \$25 a month. *Held*, that the court would not set aside a verdict of \$1250 as excessive.

*Sanders & Husbands* for appellee.

SMITH, J.—In this action, brought by a passenger to recover damages for personal injuries, the railroad company and its receiver were jointly sued. The complaint alleged that at the time of the injury the road was operated under the management of E. K. Sibley, who was appointed receiver under a decree of the Circuit Court of the United States for the Eastern District of Arkansas. The answer denied negligence and averred contributory negligence in the plaintiff. The following verdict was returned: "We, the jury, find for the plaintiff, and assess the damages at \$1250." The defendants filed separate motions in arrest of judgment, on the ground that the verdict was general, and did not fasten the liability on either of them. These were both overruled.

RAILROADS: IN  
HANDS OF RE-  
CEIVER: WHO LI-  
ABLE FOR DAM-  
AGES.

The complaint states no cause of action against the railroad company. "The corporation itself cannot be held responsible for the negligence of servants of a receiver operating the road. The receiver's possession is not the possession of the corporation, but is antagonistic thereto, and the company cannot control either the receiver or his employees." *Pierce on Railroads*, 285; *High on Receivers*, § 396; *O. & M. R. Co. v. Davis*, 23 Ind. 553.

The effect of the misjoinder of these defendants is not, however, to vitiate the verdict as to the receiver. Nothing was alleged in the pleadings and no evidence was given at the trial, showing any liability of the railroad company. And not even at common law in actions for torts was a misjoinder of defendants available to those who were properly sued. The plaintiff might succeed as to some and fail as to others.

A motion for a new trial was filed on the ground of want of evidence to support the verdict, error in the instructions, excessive damages, etc.

The facts, as shown by the bill of exceptions, were as follows: Plaintiff got on the train at Forrest City, with the intention of going to Brinkley. Just on the outskirts of Brinkley the track of the Texas & St. Louis R. R., popularly known as the "Paramore Road," crosses the track of the Memphis & Little Rock R. R. When the train on which plaintiff was a passenger had arrived within a short distance of the station at Brinkley, the brakeman, as usual, called out the name of the station. The train ran on a few paces further, and, arriving at the crossing of the Texas & St. Louis R. R., stopped a few moments, as is customary,

FACTS.

before crossing the track of another road. The night was dark. The plaintiff thought he had reached his destination. He arose from his seat, went out on the platform, and looked out on one side. He saw no platform or other indication of a depot, only a bright light ahead, which he took to be the headlight of a locomotive. The plaintiff then went across the platform to the other side. Just at this time the train began to move slowly forward. The plaintiff, supposing that he was about to be carried beyond his station, stepped off, fell, and was taken in an insensible condition to a doctor's shop.

It is contended that, on this state of facts, the plaintiff is not, as a matter of law, entitled to recover, and that no shadow of negligence is shown.

The appellants rely on the case of *Lewis v. London, Chatham & Dover R. R. Co.*, L. R. 9 Q. B. 66; also reported AUTHORITY EX-AMINED AS TO NEGLIGENCE in 7 Moak, 119.

The facts were that plaintiff, a woman, took passage on a train from St. Mary Cray to Bromley. As the train approached Bromley the name of the station was called out, and shortly afterwards the train stopped, but not until it had carried the plaintiff's car beyond the platform. The plaintiff got up from her seat, and started to descend from the car where it was. Just as she was stepping from the train, it was backed suddenly for the purpose of bringing all the cars abreast of the platform, and the plaintiff fell, and was injured. It was held that she was not entitled to recover.

Mr. Justice Blackburn said: "It appears that the train was coming up to the station, and some official on the platform called out, 'Bromley—Bromley!' Calling the name of the station, I understand, and have always understood, to mean this: that it is an intimation to all who are travelling by the train that the station at which the train is about to stop is that particular station. Calling out the name of the station is not an invitation to alight."

But this case has been virtually overruled by *Bridges v. North London R. R. Co.*, Law Rep. 7 H. L. 213; s. c., 9 Moak, 165. The action was tried before the same judge, Blackburn, *at nisi prius*, and the evidence disclosed a similar state of facts. But the case was withdrawn from the consideration of the jury. This was held to be error. No positive rule of law was laid down as to the effect to be given to calling out the name of a station, but Mr. Baron Pollock, in his opinion before the Lords, concurred in the opinion of Mr. Justice Willes in the same case in the Exchequer Chamber: "It is an announcement by the railway officers that the train is approaching, or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or, under circumstances induced and caused by the company, in which the man reasonably supposes he is getting out at the place where the company intended him to alight."



In *Weller v. London, etc., Ry. Co.*, Law Rep. 9 C. P. 126; s. c., 8 Moak's Eng. Rep. 441, on the approach of a train to the station, a porter called out the name of the station, and the train was brought to a stand-still. The plaintiff, a season-ticket holder, accustomed to stop there, stepped out of the carriage in which he was seated, and falling upon an embankment was injured. The train had overshot the platform. It was night and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the train was to be backed. Brett, J., said: "I agree that to call out the name of the station before the train has come to a stand-still is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and the engine-driver has overshot the station, and the train has come to a stand-still, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events the jury may from the facts infer negligence."

And the best considered American cases are to the same effect. Thus in *Central R. R. Co. v. Van Horn*, 38 N. J. Law, 133, Beasley, C. J., said:

"The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then to stop the train short of such station, in the night time. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night this must be the inevitable result. It is said, in the brief of the counsel of the defendant, that it was right to give the notice at a long distance from the depot, so that the passengers might prepare to leave the cars. This may do when the train is not to stop before it reaches the station. When a station is called, the passengers have a right to infer that the first stop of the train will be at such station."

In *Taber v. D., L. & W. R. R. Co.*, 71 N. Y. 489, plaintiff was a passenger on defendant's train; she had a ticket for W.; she was not familiar with that station, but knew it was the next station to C. F., and about three-fourths of a mile therefrom. The night was dark, there was no depot at W., or station light, or anything to indicate the stopping place to a person not familiar with it. She knew when the train passed C. F., and as her evidence tended to show, after the proper interval, so as to run the distance to W., the train came to a full stop; it had in fact run by the station. Before reaching it the brakeman announced the station; several passengers arose to leave; plaintiff then rose from her seat near the centre of the car, walked out upon the platform, took hold of the rail, stepped down one step and was in the act of stepping to the

second, when the train with a violent jerk started back, throwing her down and off, and she was injured. In an action to recover damages, held that it was a question for the jury, whether in the exercise of reasonable care and prudence, defendant should not have given notice to passengers desiring to alight at the station, that the train had not come to a final stop but would back up, and that the plaintiff was justified under the circumstances in supposing she had reached her destination and in attempting to leave the car; at least that the question of contributory negligence on her part was proper for the jury. See also *Milliman v. New York Central & Hudson River Railroad Co.*, 6 Thomp. & C., 585; s. c., 3 Abb. N. C.; affirmed 56 N. Y. 585.

In the case of *The Columbus & Indianapolis R. R. Co. v. Farrell*, reported in 31 Ind. p. 408, the plaintiff was on the car of the defendant railroad. The night was dark. The conductor stopped the train and announced the name of the station, "Cumberland." Plaintiff could not see whether there was any platform or not, or where he was going to alight, but in good faith, relying on the announcement made by the conductor, stepped off in the dark into a culvert twenty feet deep, and was injured, and the Supreme Court of Indiana, in passing upon the question of contributory negligence in that case, by approving the instructions, say: "If the plaintiff did not alight from the train until it had been fully stopped, nor until the defendant's servants had announced the name of the station, or it had been announced from the proper and usual place of making such announcements, he had the right to believe that the train had reached a proper stopping place and that he could safely alight; and if he did then alight, and did so without knowing the danger of the place, and in consequence of the darkness of the night he had no reasonable opportunity of ascertaining the danger, and he was injured in so alighting, he will be entitled to a verdict."

In *Mitchell v. Chicago and Grand Trunk R. R. Co.*, 51 Mich. 236; s. c., 12 Am. & Eng. R. R. Cas. 163, also relied upon by appellants, the facts of the case, as stated by the court, were as follows:

"Just before arriving at the junction, and when the train was some 300 or 400 feet from it, the name of the station was called out by the proper person, and the cars came to a full stop, as required by law before reaching crossings. Plaintiff at once left her seat, and hurried to leave the car. It does not appear that any person employed on the train noticed her. She went down the steps where there was no platform or other convenience for landing, and just as she stepped off, the cars were suddenly started again to go forward to the depot, and she fell, and broke her ankle." And it was held the plaintiff had no right of action.

But that case is distinguished from the present in several particulars. The accident happened during daylight, and that is a material circumstance in this class of cases. Then no announcement

was made or other invitation given to alight. And again, before reaching the place, the conductor notified her he would escort her to the depot of the connecting line.

To apply the principles discussed to the case in hand: It was no negligence in the receiver's servants to stop the train before crossing the track of the St. Louis & Texas road. That was only a proper precaution to prevent collision. It would, also, have been no negligence to announce the name of the station before stopping, provided passengers had been warned to keep their seats or otherwise informed that the stop was only a temporary one. But to make the announcement without such caution, was an invitation to passengers bound for that station to alight when the train came to a stop, and was a circumstance from which a jury might well infer negligence, if, in attempting to alight, an injury was received. The charge of the court and its refusal to charge were in accordance with these views.

All that is left in this case is the question of damages. The plaintiff received a severe cut upon the head, leaving a permanent scar; and the ends of his fingers on one hand were mashed off. As we have stated, he lost consciousness when he fell. He was confined to his bed for four weeks and disabled from work for four months. His bill for medical attendance and medicines was between \$25 and \$35. He lost thirty pounds of flesh and suffered great physical pain, his hand having risen and become a running sore. His labor on the farm at that time of the year was worth \$25 a month.

The assessment of damages was, perhaps, somewhat too liberal to the plaintiff. Yet there can be, from the nature of the case, no exact measure of compensation for physical pain, and mental anguish which is inseparable from it. Under such circumstances, appellate courts are loath to interfere merely because damages seem excessive. The jury and the trial judge, before whom the plaintiff's wounds were exhibited at the distance of nearly a year from the happening of the accident, could more justly estimate the extent of those injuries than we can possibly do from the transcript.

The judgment against the railroad company is arrested, and the judgment against the receiver is affirmed.

**Liability of a Receiver for Torts committed during his management of the road,** see note to *Gibbs v. Greenville, etc.*, R. R. Co., 9 Am. & Eng. R. R. Cas. 786. See also *Mitchell v. Grand Trunk R. R. Co.*, 18 Am. & Eng. R. R. Cas. 179.

ADAMS, Adm'r,

v.

LOUISVILLE AND NASHVILLE R. R. Co.

*(Advance Case, Kentucky. March 12, 1885.)*

In an action for negligence against a railroad, while the special findings of the jury showed that the road had not used ordinary care, they also showed that plaintiff had failed to use such care, *held*, the court properly entered a verdict for the road, although the jury had found for plaintiff.

Upon a special finding the questions put to the jury should not be so numerous as to bring out the evidence in detail, but be limited to such as ascertain the prominent facts in issue.

After a witness has testified in chief it is in the discretion of the trial judge to refuse or to allow a re-examination as to the same matter, and he may refuse if satisfied the witness has already told all he knows.

Special verdicts are not violative of the ancient right of trial by jury.

The plaintiff on a dark night was a passenger in the rear car of a railroad train. As the train was approaching a refreshment station, the plaintiff arose and got off while the train was slowing up, but before it actually stopped. In so doing he stepped from the step of the car through a trestle upon stones in the bed of the creek and was injured. In an action by him against the company to recover damages, the only negligence alleged was the placing of a sleeping car between the ordinary passenger cars so as to make the car on which plaintiff was riding the last in the train.

*Held*, that the court should have ordered a verdict for defendant.

APPEAL from Hardin circuit court.

*J. P. Holson* for appellant.

*Wm. Lindsay* for appellee.

PRYOR, J.—In the case of *Witty v. the Railroad Company*, reported in 6 Ky. Law Reporter, 321, it was held that where the jury is directed to find a special verdict, the court may, but is not compelled to, direct them to find a general verdict, and it was further held that the failure to instruct the jury as to what was ordinary, and what willful or gross neglect, was not error, because when the facts were found by the jury it was a question of law for the court. Sub-sec. 5, of section 317, that when a special verdict is required, the questions of law may be reserved by the court until after verdict. So in this case there was no error committed in refusing the instructions applicable to a general verdict or in refusing to require such a verdict to be rendered.

The principal objection to the proceedings in this case arises from the number of questions or interrogatories propounded to the jury by both parties. The answers to special interrogatories were designed to lead to the finding of certain prominent facts that must determine the law of the case, either for the plain-

FACTS.

tiff or the defendant. There has been a departure in this case from this rule on both sides, the plaintiff propounding some sixteen interrogatories and the defendant about twice that number. Twelve men were sworn as jurors, and after hearing the testimony, were required to give in substance the statement of each witness. They were examined and cross-examined as to the entire testimony, and the mode of interrogation could not have extended further if the jury as a body had been required to depose on oath as to the substance of all the testimony given. Such a practice not only incumbers the record, but confuses the minds of both the court and jury, and leaves all parties at sea as to the issue of fact to be tried. There was only one issue in this case, and that was, did the intestate lose his life by the willful negligence of the company or its employees, if so, in what did that negligence consist. It is the controlling fact or facts that should be ascertained by the special findings, and not the testimony establishing those facts. It may have been a dark night, and the intestate may have eaten his supper at Louisville before the train left, and while such questions were proper to ask a witness, they were not such facts as should have been made the subject of a special finding. Both parties, however, having seen proper to interrogate the jury in that manner, the response of the jury to the questions propounded by the defendant may be disregarded, and still the response to the plaintiff's interrogatories shows that no recovery could be had. The intestate had left Louisville for his home at or near Elizabethtown, about ten o'clock at night on a long train of passenger cars that were carrying those who had attended some celebration at Louisville, bound to their homes. The ordinary train was not sufficient to hold them, and passenger cars were attached to a sleeper that seems to have occupied about the middle of the train. The intestate was in a car behind the sleeper, and next to it. When reaching the depot at Colesburg, it is alleged that the train having stopped at the depot, and that fact being announced, the car in which the intestate was seated, by reason of the length of the train, stood over a small creek, and the intestate getting out of the train to go forward for the purpose of getting something to eat, fell through the trestle on stones in the bed of the creek, and was so badly injured that he died the next day. It was a very dark night, and the intestate was no doubt in ignorance of the danger when he left the car. Two young men in the car with him followed him out, but did not see him fall, although one of them fell shortly after the intestate did, but received no injury. The jury said by their special finding for the plaintiff, 1st, that when the train stopped at Colesburg, the employees called out the station. They further said that where the intestate got off it was not a safe place to land passengers.

In answer to a question as to whether, after getting off the car, the intestate fell from the bridge or trestle, the jury responded that

they believed the train was *slowing* up when he got off. They further said that the intestate failed to use ordinary care, and that the employees of the company or the company were guilty of a want of ordinary care in leaving the sleeper between the ordinary passenger cars. When asked, if the plaintiff ought to recover, what amount should she receive, they responded by saying we believe the plaintiff should recover twelve hundred and fifty dollars.

The special finding by the jury was to the effect that the train was moving to the depot slowly at the time the intestate got off the train, and that the latter was himself in fault, while the only neglect on the part of the company consisted in its having a sleeper midway between the ordinary passenger cars. On such special findings the court must necessarily have rendered a judgment for the defendant. The evidence on the part of the plaintiff also conduces to sustain this view of the case.

The witness, Chelf, who left the car at the time of the accident, following the deceased, was submitted to an examination in chief as well as to a rigid cross-examination, and his testimony tended to show that the car must have been moving when the intestate, who preceded him, got off. The counsel for the plaintiff, after the cross-examination had ended, desired to examine his witness with reference to the same matter and to explain his statements made on the cross-examination. The court refused this privilege, upon the ground, no doubt, that as to time, place, and other circumstances connected with the occurrence, the witness had made full and complete statements. The witness was before the court, and from his statements, conduct, etc., the court may have been satisfied that he had disclosed to the jury fully all he knew in regard to the death of the intestate. We cannot say that it was an abuse of discretion, and particularly when looking to the affidavit of Chelf filed on the motion for a new trial. In this affidavit the witness states that he saw intestate after he got off the car, and he knows the car stopped, or about stopped when Adams got off.

This still leaves the matter in doubt, and particularly when Chelf walked along safely to the front of the train and Adams fell through the trestle. The evidence of the defense conduces also to show this same state of case. While it is not necessary to determine the liability of the company in failing to have a secure and safe place of egress from any of its cars whenever it may stop at a depot, we are satisfied from the proof that the cars were in motion when the appellant's intestate attempted to leave them, and that his sad misfortune resulted from his own neglect. It is proven that the name of the station was called out, and this is always or usually done before reaching the depot, and those on the rear of the train, in their anxiety to leave for something to eat, undertook to get off before the train stopped. The jury has so said and the verdict is sustained by the testimony; so without looking to the

special verdicts returned for the defendant, the law of the case is against the plaintiff upon the findings to her own interrogatories.

It is claimed that these special findings are in violation of the ancient mode of trial by jury. This question is made for the first time, and after repeated adjudications by this court in reference to special verdicts. It is the province of the court to pronounce the law and the jury to pass on this issue of fact, and whether the law is given before or after the finding of the facts by the jury is immaterial.

When the evidence offered is not of the character that will support the plaintiff's claim or the issue made, a demurrer <sup>DEMURRER TO EVIDENCE</sup> to the evidence was the practice at common law, and this applied when there was no special finding authorized, but Mr. Stephen says "a more common, because more convenient, course than this to determine the legal effect of the evidence is, to obtain from the jury a special verdict instead of finding the negative or affirmative of the issue, as in a general verdict. The jury at common law ascertained all the facts disclosed by the evidence, and then left the court to say whether the law authorized a verdict for or against the plaintiff." Stephen on Pleading, page 123. The jury gave their opinion as to the existence or non-existence of the fact or facts involved in the issue, and then a verdict was entered, says Mr. Stephen, without their interference. While the jury has said that the plaintiff ought to recover \$1250, it is certain that the response was obtained by the character of interrogatories propounded by the plaintiff. "If the plaintiff ought to recover, what amount or sum is she entitled to?" There could have been no mistake as to the finding, and if there was, the court ought not to have ascertained it from the jury. The special interrogatories were all answered, and in such a manner as determined the case for the defendant. The court properly overruled the motion for a new trial, nothing occurring during the progress of the trial or after that entitled the plaintiff to be again heard. Judgment affirmed.

**Negligence of Deceased in Alighting from the Train was not Contributory to his Killing.**—The court seem to assume that it was contributory negligence *per se* for the deceased to leave the train while in motion. It is not the law that the mere fact that the train is moving makes the act of a passenger in attempting to alight negligence *per se*. Note to Cincinnati, etc., R. R. Co. v. Peters, 6 Am. & Eng. R. R. Cas. 136. But even assuming this to be the law, it would seem clear that the negligence of the plaintiff in stepping off the car while in motion, did not contribute in any proper sense to the injury. The injury resulted not by the motion of the train, but from the nature of the place where deceased alighted, and the fact that if deceased had awaited to alight until the train had come to a dead stop he would have been carried beyond the dangerous place where he actually did alight, is purely accidental.

## TEXAS AND PACIFIC R. R. Co.

v.

GARCIA.

(62 Texas Reports, 285.)

1. If a conductor of a railway train receives on his train minors, knowing that they are travelling under a "drover's pass" as assistants to a drover, under a pass which contained a provision that minors should not be permitted to travel as assistants under such a pass, the minors are entitled to all the rights as against the company, for injuries received through the negligence of its servants, that any other passenger would have.

2. When there is a mistrial of a cause and the jury is discharged, the cause may be again tried at the same term, and no objection on account of such second trial can be considered on appeal, unless a motion was made in the court below to continue for the term or postponed to a later day in the term.

3. It is not error to permit counsel, in the closing argument, to reply to an argument made by the adversary on a question of law applicable to the case, and to comment upon authorities applicable to the question.

4. The time and method of argument of counsel is largely subject to the discretion of the trial court, and the supreme court will not reverse a judgment for the sole reason that it might believe that too much latitude in discussion had been permitted, when it is not made to appear that the appellant was prejudiced thereby.

5. The practice of using language in an argument referable to facts not in evidence, and calculated to rouse the prejudices of the jury against a party to the cause, should not be permitted. But when such language is used in response to similar language used by the adverse counsel, and equally unauthorized, the party provoking such a course of argument will not be heard to complain on appeal.

6. A passenger was injured in alighting from a railway-car in the night, at the wrong place and time, believing that he had reached his destination and had been directed to leave the car, whereby he was injured. *Held*, that in every such case all the facts surrounding the circumstances under which he left the car should be looked to, and from them, in each case, the jury must determine, as question of fact, whether the passenger was authorized to believe from the acts and words of the servants of the company that it was intended that he should alight from the car at the time and place he attempted to do so.

APPEAL from Harrison. Tried below before the Hon. Felix J. McCord.

Manuel Garcia, a minor ten years old, brought suit in the district court of Harrison county, Texas, by his next friend, Sixto Garcia, against the Texas & Pacific R. R. Co., averring that on August 20, A. D. 1883, he was a passenger on one of appellant's trains going from Longview Junction to Marshall, Texas, and the train of cars went to Marshall on that date with appellee as a passenger thereon; that when the cars arrived at Marshall, the agents and employees of appellant in charge of the train told Sixto Garcia,



who was the father of Manuel, that they were at Marshall, and to get ready to get off—he was just going to pull them to where they were to get off,—and when said agents and employees whose duty it was, informed Sixto, Manuel was awakened from his sleep, and then the train came to a stop, and Manuel, thinking the train was at the proper place for him to get off, walked out of the car to get off, and when Manuel got out upon the platform of the car, the agents and employees of defendant in charge of the train, without giving any signal or warning of any kind, caused the train to move very slowly; that then Manuel stepped on to the car in front of him, and was there but a moment when the agents and employees of appellant in charge of the train caused “said train of cars to give a very sudden, hard, severe and brutal jerk backwards,” which threw said Manuel forward, down on the ground, under the train of cars, and the jerk was caused by the gross negligence and carelessness and wilful misconduct of appellant and its agents and employees in charge of the train, which negligence, carelessness and misconduct caused Manuel to be thrown under the cars on the ground, and caused him to be seriously and permanently injured, as follows: “The left arm was crushed, crushing the bones in said arm at the elbow joint, and mashing and crushing the arm all over, and bruising the arm all over severely, and also broke the right leg badly, and hurt the thumb and fingers on the left hand, dislocating and severely injuring them, and severely injuring the right arm and hand and left leg and the feet of said Manuel by bruising and mashing them, from which said injuries said appellee was forced to and did go to bed, and was forced to and did have a surgeon and physician, and on account of said injuries said Manuel was forced to and did undergo a dangerous surgical operation by having bones and pieces of bones of his left arm taken out at the elbow joint, and that the skin and flesh of the left arm all came off, all on account of said injuries.” That “said Manuel has been seriously and permanently injured, and that it will shorten his life and tend to shorten it, and renders his left arm wholly useless and valueless to him, and that he will not be able to labor and earn money as well as he would if said injuries had not been afflicted.

Appellant filed an answer containing a general demurrer and numerous special exceptions to plaintiff's original petition, and general denial, and specially that plaintiff was not a passenger on its train, but was there travelling on a free ticket called a “drover's pass,” which was obtained by the father of plaintiff, who falsely represented to the agent of the defendant who issued the same, at time of issuance, that Manuel was a grown man, and competent to take care of and attend to feeding of a lot of horses, the property of Sixto Garcia, plaintiff's father, that was being shipped over defendant's road, and that defendant had a custom, when shippers of horses request it, to issue drovers' passes to the persons in charge

of such animals to go with the same and return free, but defendant only issues said passes to grown persons. That Sixto Garcia applied for drovers' passes, at the shipment of said animals, for himself as owner and Manuel as assistant, representing to agent issuing same that Manuel was a grown man, when he was a little boy. That had not the agent been so deceived he never would have allowed Manuel to travel under the pass, and never would have issued same. That tending stock on a freight train is exceedingly dangerous, and more dangerous than travelling on a regular passenger train, and no person of Manuel's age ought to be allowed to take such risks. That Sixto Garcia, by his fraud, voluntarily exposed Manuel to the danger, and but for this no injury would have happened, and by reason thereof both Sixto and Manuel were guilty of contributory negligence, and were not, by reason of the fraud, entitled to be held as passengers. That when the train reached Marshall and was moving into the yard, Sixto Garcia got off while the train was moving, and Manuel walked out upon the platform or flat-car, and while standing there was thrown off and injured by the ordinary movement of the train, and appellant's agents in charge of the train were not informed of Manuel being on the flat-car; that had he remained in the passenger-coach no injury would have happened to him, and that Manuel and his father thereby contributed to bring about the injury.

There was much evidence, but that which is material will be found in the opinion. Verdict and judgment for Manuel Garcia for \$10,000.

*James Turner* for appellant.

*Alex. Pope* for appellee.

STAYTON, J.—The ruling of the court in reference to the admission of proof to the effect that the "drovers' pass," on which Sixto Garcia and his son Manuel and another boy were traveling, contained a provision that neither "minors nor women" should travel thereon as assistants to the drover, was in no manner important under the facts presented. The conductor of appellant's train saw that pass and knew who the assistants were who were travelling on it. Knew that they were minors, and, notwithstanding this, received them as passengers. Under this state of fact they were entitled to all the rights, in so far as any question involved in this case goes, to which any other passenger on that train would have been entitled; and proof of the contents of the "drovers' pass" would not in the slightest degree have affected the case.

#### RETRIAL.

The fact that there had been a mistrial of the cause furnished no legal reason why the cause should not be called up again at the same term and tried.

The statute declares that "where a jury has been discharged as

herein provided, without having rendered a verdict, the cause may be again tried at the same or another term." R. S. 1314.

If any reason existed why the defendant could not safely try the cause when it was called the second time, then an application to continue or to postpone the case until some later day of the term should have been made.

No such motion was made, and, so far as the record shows, the appellant was not in any manner prejudiced by the trial of the cause at the same term at which the mistrial occurred.

It is not error for the court trying a cause to permit counsel for the plaintiff in the closing argument, in reply to an argument upon the law applicable to a case made by counsel for the defendant, to discuss the same question and to read and comment upon authorities applicable to the question.

READING AU-  
THORITIES IN  
ARGUMENT.

The line and method of argument to be pursued by counsel in any stage of a trial is subject largely to the discretion of the trial court, and unless it appears very clearly that such discretion has been abused, this court would not feel authorized to reverse a judgment simply because it might be of the opinion that a different course should have been pursued. It is not made to appear that the appellant was in any way prejudiced by the course of argument which counsel for the appellee was permitted to pursue in reply to the legal propositions asserted by counsel for appellant, and the bill of exceptions shows that the argument was in reply.

It appears from a bill of exceptions that counsel for the appellee, during the closing argument in the cause, was permitted to use language calculated to arouse the prejudices of the jury against the appellant, and this upon matters not arising from the facts of the case. This practice has been often condemned by this court (*Willis & Bro. v. McNeill*, 57 Tex. 474; *T. & St. Louis R. R. Co. v. Jarrell*, 60 Tex. 270); and in some cases such course may afford sufficient ground for the reversal of a judgment.

The language used by counsel for the appellee in the closing argument was highly objectionable.

It appears, however, from the bill of exceptions, that the language was used in reply to language used by counsel for the appellant, which was but little less, if not fully as objectionable, as that used in reply.

If counsel for one party pursues a line of argument not called for by the facts of the case, and in itself improper, and thereby invites a reply, the party so through counsel violating a proper course of procedure and the rules intended to secure the proper presentation of causes, ought not to be heard to complain of the reply; and in such cases this court will not reverse a judgment on an assignment of error based on such facts.

The main question in this cause is raised by the tenth assignment of error, which urges that the court erred in overruling the motion

of the appellant for a new trial, based on the insufficiency of the evidence to sustain the verdict.

The petition was not bad on general demurrer, and there was evidence tending to support its averments.

The jury having found a verdict in favor of the appellee, there being a conflict of evidence, but not such a preponderance against the verdict as to authorize this court to set it aside, it must be held that the facts stated by the witnesses for the appellee relating to the want of due care by the employees of the appellant are true.

As before said, the facts alleged and proved made Manuel Garcia a passenger of the appellant's railway at the time he was injured; NEGLIGENCE A QUESTION FOR JURY. there is no objection made to the charge of the court, and as the question of negligence of either or of both of the parties was one for the determination of the jury, their verdict must be sustained if there be evidence fairly tending to prove that there was not the exercise of due care by the employees of the appellant which the law exacts of a carrier towards passengers.

The evidence for the appellee shows that Sixto Garcia and his son Manuel, a boy of ten years of age, were passengers on appellant's train from Longview to Marshall; that the train was a freight train having a car in which passengers rode; that with the train were four car-loads of horses which Sixto Garcia was taking to market; and that on the way from Longview to Marshall the father and son, and another boy who was travelling with them, stayed in the passenger car, the two boys being asleep on a bed which the conductor had made for them, until they arrived at Marshall.

Sixto Garcia testified that, when the train reached Marshall, the conductor came to him and said "Marshall, get ready to get off, I am just going to pull you to the stock yards," whereupon he aroused the two boys and assisted them in putting on their clothes and getting ready, and that in a moment or two the train stopped; that the train was moving very slowly when the conductor spoke to him, and that as soon as the conductor told him he was at Marshall and directed him to get ready to get off, the conductor took his light, went out of the car and got off while the train was still moving slowly, after which the train immediately stopped; that the train again moved very slowly a little forward and again stopped, and that he then thought from what the conductor had said to him, from the conductor getting off of the train, and from the stopping of the train, that they were at the proper place for him and the two boys to leave the car, at which time there was no employee of the appellant on the car, nor any light in it, it being in the night.

He further stated that after the car stopped the second time he took the two boys and went out of the car for the purpose of getting off; that when he reached the platform of the car it was dark, and neither light nor any one to aid them in getting off; that he

looked for the conductor or some other person and could see no one, and that he then stepped on the car just in front of him for the purpose of seeing on which side of the train to get off, and to see on which side of the train the stock yards were, and to look for some employee of the railway company; that he could see better from the car on which he stepped than from the platform of the car which he had left; that when he stepped on the car in front of that in which he had ridden, both of the boys were with him, one on each side and held by the hand; that then, without any warning, the train was moved, giving a very severe jerk by which he was thrown forward against the car and his son (Manuel) thrown under the car, which ran over him, crushing one of his arms and breaking one of his legs.

The witness further stated that he and the two boys were strangers at Marshall, and that the conductor knew that fact, and that neither he nor either of the boys knew anything about the relative situation of the depot and stock yard.

The testimony of Manuel Garcia was substantially the same as that of his father.

From the conductor's testimony it would appear that Sixto Garcia and the two boys were expected to alight at the place on the main Shreveport track, where it was intended to leave the cars in which the horses were. The position of that place in relation to the place where the three did attempt to get off is not shown.

What inferences the plaintiff and his father might draw from the language and acts of the conductor, by them related, was a question for the jury. If, from the language used, they were reasonably authorized to believe it was the intention of the conductor that they should leave the car when it stopped, then they might do so, if not careless in the manner of leaving, without being guilty of contributory negligence.

The car was moving slowly when the conductor notified the father that they were at "Marshall," the terminus of their journey on that car; the announcement was made for the express purpose of having them to get ready to leave the car; they were informed that he was just going to pull them to the stock yards; they were traveling with and for the purpose of taking care of stock, and may they not have been authorized to believe when the cars stopped, moved on a short distance and stopped again, that they had reached the stock yards, and that it was intended they should alight? The jury in effect so found, and we are not prepared to say as matter of law that their finding was wrong.

It is said by an elementary writer of recognized ability, "that the calling of the name of a station, on coming to a <sup>CALLING OUT</sup> stop, is to be regarded as an invitation to alight; and a <sup>STATION.</sup> passenger who on such summons leaves the car, taking due caution to look around him when practicable, may recover from the com-

pany in case he be injured by ignorantly stepping on an unsuitable place." Wharton on Negligence, 379, 650. The author cites *Lewis v. Railroad*, L. R. 9 C. P. 66, and *Southern R. R. v. Kendrick*, 40 Miss. 384, neither of which are accessible to us here, as authority for the proposition. The rule seems to have been recognized in *C. & I. Central R. R. Co. v. Farrell*, 31 Ind. 408.

The same reasons which lead to the adoption of the above rule would perhaps have as much force in a case like the present as in one in which the name of the station is called after the train has stopped, but in either case it presents a question of fact.

The question seems to have been frequently considered by the English courts, and many of the decisions of those courts will be found collected by Mr. Hutchinson in his work on Carriers.

To the cases referred to we have not access here, but the author, summing up the result of these decisions, says, "from which the conclusion to be drawn is, that such companies must be extremely careful not to mislead their passengers into the belief that the halting of a train at a station is meant as an invitation to them to alight, when it is not so intended; and that if the conduct of the servant engaged in its management is such as may reasonably produce that impression, and the passenger so understands it, and in the attempt to leave the coach at a place where no facilities are provided for his doing so, and whilst in the exercise of due diligence in doing so, he is injured, the company will be liable." Hutchinson on Carriers, sec. 615.

In every case, all the facts surrounding it should be looked to, and from these a jury must determine as a question of fact whether the passenger is authorized to believe from the acts or words of the servants of the carrier that it is intended he shall alight from a car at a given time and place; and looking to all the facts in this case, we are not prepared to say that there was not sufficient evidence to justify the jury in finding that the appellee was authorized to believe that he was expected to alight from the car at the time and place at which he attempted to do so; nor can we say, looking to all the facts, which, under the verdict, we must assume to be true, that, in attempting to alight; the appellee did not use such care as a prudent person under like circumstances would be expected to use.

The court did not err in refusing to give the charges referred to in the eighth assignment; for it could not declare as matter of law that it was not negligence in the conductor of the train to absent himself from the train at the time and for the length of time he was shown to be absent; and, besides, it would have tended to divert the minds of the jury from other matters which perhaps had more bearing on the question of negligence than had the absence of the conductor.

The verdict is large, but the injuries received were of the most

serious character, and in such cases, in the absence of some fact tending to show that the verdict is not the result of the honest and deliberate judgment of the jury as to the extent of injury done to the party complaining, this court has no power to set the verdict of a jury aside.

We cannot say that any such fact appears in this cause, and the judgment is affirmed.

Affirmed.

See note to case of Memphis, etc., R. R. Co. v. Stringfellow, *supra*.

### SULLIVAN

v. R.

### OREGON RAILWAY AND NAVIGATION CO.

(Advance Case, Oregon. June 11, 1885.)

The plaintiff brought an action against the defendant, a railroad company, to recover damages for an injury alleged to have been caused by the plaintiff being ejected from a moving train of defendant's, by the conductor thereof. The fact of ejection by the conductor was in dispute. To prove that he was ejected by the conductor, the plaintiff called as witnesses, persons who came to him while lying on the ground shortly after the injury, and who were allowed to testify, against objections, that he the plaintiff, in response to witnesses' questions as to what was the matter, replied: The s— of a b— pushed me off or throwed me off: I am not sure which." This was two or three minutes after the accident. *Held*, that what plaintiff said to witnesses was not admissible,—not as part of the *res gesta*, because the plaintiff's statement as to the cause of his removal from the train was not contemporaneous with the act of removal. Statements made by plaintiff to said witnesses as to his physical condition or bodily pain would have been admissible as part of the *res gesta*.

In order to fasten upon a railroad company liability for an injury caused by the wrongful act of a conductor, it is necessary to prove that said conductor was the servant of the road at the time, and if the train belonged to another company at the time and was running on defendant's roadbed under a contract for the use of said roadbed, the mere fact that defendant paid the conductor would not necessarily make him its servant.

It is error to allow punitive damages against a principal for the unauthorized wrongful and malicious act of the servant.

Appeal from Wasco county.

Gates & Wilson and J. E. Atwater for respondents.

Rufus Mallory and F. P. Mays for appellants.

THAYER, J.—This appeal is from a judgment of the circuit court for the county of Wasco, rendered in favor of the respondent and against the appellant, in an action commenced in said court by the former against the latter to recover damages in con-

FACTS.

sequence of his having been put off of a train of cars alleged by him to have been owned and operated by the appellant. The respondent alleged in his complaint in said action that on the tenth day of October, 1883, he went aboard of said train of cars at Dalles City, a regular station on the line of appellant's road, for the purpose of being conveyed to Portland, and that the conductor thereof, after the cars had started and were in motion, ejected him therefrom, by reason of which he was thrown under the wheels of the cars, and had his right foot so badly crushed that it had to be amputated. The language of the allegation of the complaint referred to is as follows:

"That after the said train of cars had gone about one-fourth of a mile from said Dalles City, and while said train of cars was rapidly moving along its said railway, the defendant, by its agent and employee, who had then control, care, conduct of said train of cars for defendant, carelessly, negligently, and with force, ejected this plaintiff from its said train of cars, and caused him to fall from said cars to the ground while the same were so rapidly moving, and by reason of the said careless, negligent, and wrongful acts of the defendant, the plaintiff was thrown under the wheels of said cars, which cars then and there, on account of the wrongful acts of the defendant, as aforesaid, ran upon and over the plaintiff, and crushed and wholly destroyed his right foot."

The amount claimed, of general and special damages, was \$50,000. The appellant took issue respecting ownership and operation of said train of cars, the rejecting the respondent therefrom, and the damages alleged by respondent to have been sustained. It also set up in its answer that the injury received was in consequence of his own carelessness and negligence. The case was tried by the court, and a jury duly impaneled. It appears from the bill of exceptions that the controversy at the trial was mainly as to whether the conductor of the train pushed the respondent off the cars, or that he jumped off at his own instance. The respondent testified that the conductor pushed him off while the cars were in motion; the conductor, on the contrary, denied that he touched him; testified that he did not know when he got off the cars; that he went and pulled at the bell-rope, and when he looked around the respondent was off. Another witness called by appellant, who seems to have been a passenger aboard the train, testified that he saw the whole affair, and corroborated the testimony of the conductor; stated that the conductor did not touch respondent. He also testified that the respondent jumped off the train. The jury returned a verdict for the respondent and against the appellant for the sum of \$11,459, upon which the judgment appealed from was entered. The questions submitted upon the appeal involve the competency of some of the evidence given to the jury and the correctness of a part of the instructions of the



court to the jury, which we now proceed to notice. The bill of exceptions also shows that the respondent was a witness in his own behalf; that after he took the stand and was sworn he stated that he went aboard the train of cars at Dalles City on the tenth day of October, 1882; the train was bound west; that it was in front of the Umatilla House where he went onto the train; that he went aboard of it for the purpose of going to Portland; that the train was an Oregon Railway & Navigation Company's train, engine No. 89, marked "O. R. & N. Co.;" that it was a passenger train; that one Garfield was the conductor. He was asked by his counsel to state all that took place on board the train at and about the time he received the alleged injury. In answer to the questions he began by stating that he got on the train in front of the Umatilla House and had a conversation with the baggage-master, which he began to relate, whereupon the appellant's counsel objected to it, but the court overruled the objection, and allowed the respondent's counsel to ask the witness this question: "State what you said to the baggage-master, and what he said to you." To which ruling the appellant's counsel excepted, and the witness stated in answer to the question that he got on the train just before it started; that he asked the baggage-master how Garfield was to ride with, to which the latter answered, "I guess he is all right; if he makes any 'kick' refer him to me."

This evidence was clearly inadmissible. The conversation between the witness and the baggage-master was wholly incompetent, but a majority of the members of the court are of the opinion that the evidence in nowise prejudiced the appellant; that it was really more calculated to prejudice the respondent's case than to benefit it. The witness then proceeded to narrate the circumstances of the injury. He testified that soon after the train started Garfield came out of the baggage-car while he was standing on the platform at the forward end of the smoking-car. A man named Clayton was with witness. There were two other men on the platform; the passengers went inside. While we were conversing Garfield came out of the baggage-car, and I spoke to him for a ride to Portland, as a favor from a railroad man. He said, "I don't know you, and don't want to." Clayton handed him his pass while we were talking. Garfield said to me: "You will have to get of this train; you can't ride." Witness told him, "All right; stop this d— train and he would get off." Witness then states that the conductor pulled the bell two or three times to stop the train, but it did not stop; that thereupon the conductor pushed him off the train, whereby he received the injury complained of. After the witness had been examined he called Charles Pool as a witness, who testified, among other things, that he saw the train pass west, and shortly after it had gone heard some one cry out, "Oh, say! Oh,

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MISSIBILITY.

say!" Went to where the person was and found the respondent. The respondent's counsel then asked the witness this question: "What did respondent say?" The appellant's counsel objected to the question, upon the grounds that the testimony was not competent. The court overruled the objection, and the witness answered: "I asked him what was the matter, and he said, 'The son of a bitch pushed me off or throwed me off: I am not sure which.' This was two or three minutes after the train passed. The train stopped just as it came through the cut-out on the flat."

The respondent then called two other witnesses to prove same facts, who were each asked some questions, which were objected to by appellant's counsel upon the same grounds, and the same ruling was made by the court, and exception taken. One of the witnesses answered that respondent said upon the occasion referred to, "Garfield pushed me off;" and the other, "that he had been pushed off the train." This testimony was calculated to influence the verdict of the jury. and, if incompetent, the judgment entered thereon should be reversed. Such testimony has in many instances been admitted in evidence, and courts have attempted to give reasons for holding it competent. The line of authorities in this country which maintain its admissibility seems to have commenced with the case of *Com. v. McPike*, 3 Cush. 184. The courts that have followed the ruling in that case have frequently manifested a sort of hesitancy as to its correctness, but have concluded that such statements were a part of the *res gestæ*, and been content to place their decisions upon that ground.

That mode of disposing of important questions of proof in such cases is becoming quite unsatisfactory. Its tendency has been to overthrow one of the fixed principles of the law, that the best evidence which the nature of the case is susceptible of shall be produced, and it leads to uncertainty and doubt. It is very easy to say that the statements and declarations of a party who has received an injury, made after its occurrence, as to how it was occasioned, are a part of the *res gestæ*, but extremely difficult to explain it, and many times wholly impossible to point out any rule under which the determination has been arrived at. An act may sometimes be explained, or its nature and quality be ascertained, by an accompanying declaration which may be properly regarded as a part of the transaction in which it occurred, but it is never the act itself, nor the mere evidence of it.

If a party were to be set upon and wounded, his narration of the circumstances attending the affair, or declarations as to who inflicted the injury, made after the transaction was ended and his assailant gone, would be no part of the occurrence; it could only be his own account of the affair. None of the class of cases referred to furnish any certain test as to when such declarations may be given in evidence as a part of the *res gestæ*. It is said in some

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CUSSED.

of them that they must have been made at the time the act transpired; but in others, that a considerable time may elapse, and they still be such part; that each case must depend upon its own peculiar circumstances, and be determined by the exercise of a sound judicial discretion. I do not fully understand what is meant by the latter expression. If it is intended by "a sound judicial discretion" that the court before whom the trial is had must judge as to whether the transaction was continuing when the declaration was made, or had ended prior thereto, then the question would not differ from other questions regarding the admissibility of testimony; the court would consider the facts and circumstances surrounding the affair, and determine therefrom as to its competency; but if, on the other hand, it is to be understood that the court is to decide the question in accordance with the judge's notions as to justice of the particular case, then it is afloat without any chart to direct it. Precedents, under that view, would be of little value, as the peculiar circumstances attending each transaction would be likely to vary from those surrounding others of a like character which had been adjudicated upon sufficiently to authorize a different holding. Such theory necessarily abrogates any law upon the subject; as law is, as a rule, applicable to a class of cases which are alike in principle.

The question is too important to be left to such uncertainty, and there is no occasion for leaving it to be determined by vague speculation. The authorities upon the subject are quite numerous, and are widely different. The Massachusetts cases, with the exception of the one referred to, have generally held to a reasonable and consistent rule upon that branch of evidence. They have repudiated the notion that the admission of such declarations is left to the discretion of the presiding judge, and admit them only when they are calculated to explain the character and quality of the act, and are so connected with it as to derive credit from the act itself, and to constitute one transaction. *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 41. This appears to me to be as liberal a rule as any court can, consistently with the rules of evidence, sanction, and I think it very doubtful whether our courts, under certain provisions of our statute, would have any right to permit the introduction of declarations of parties as evidence except under the condition of circumstances above referred to. Section 672, Civil Code, provides that a witness can be heard only upon oath or affirmation, and he can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible. And section 676, *Id.*, provides that where the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence as part

of the transaction. These provisions of the statute are declaratory of the law upon the subject, and are binding upon the court; they limit the right of a party, in the introduction of that character of testimony, to those cases where the declaration forms part of the transaction which is in dispute, and provides that it is evidence as part of it.

This statute undoubtedly lays down the rule as broadly as many of the decisions of the court have done, especially some of the later ones. See *Waldele v. New York C. & H. R. R. Co.* 95, N. Y. 274, and *People v. Ah Lee*, 60 Cal. 85; but many others have gone a most surprising length beyond it. Among them is that in *Insurance Co. v. Mosley*, 8 Wall. 397. That decision and all of a kindred nature cannot, in my opinion, be maintained without doing violence to the law of evidence. It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction, made after it has ended, are a part of it. It would be a moral impossibility. Take the case under consideration as an example. The respondent went onto the appellant's train of cars at the Dalles, and desired to be carried to Portland without paying fare. The appellant's conductor refused to carry him upon such terms. After the train started, and had gone a short distance, the respondent is found off the train, upon the ground, in an injured condition, and he alleged as a cause of action against the appellant that the conductor pushed him off. The appellant, in its answer, denies that the conductor pushed him off, and avers that he jumped off. This is the principal issue in the case. The affair, whatever it was, occurred aboard the train of cars; everything that transpired between the conductor and the respondent took place there, and ended fully and completely when the respondent left the cars, whether he was pushed off or jumped off. When the respondent went from the cars onto the ground and the train had passed on, the transaction between him and the conductor was as effectually terminated as it was a month later. In a very few minutes after the train had passed the spot where the respondent struck the ground, three persons were attracted towards him, and naturally inquired how he came in that condition, and he answered, as an enraged person would be likely to under the circumstances, as before stated, and which implicated the conductor in a reckless and grievous wrong to him. Had the respondent complained of pain and suffering it would doubtless have been competent to have given that fact in evidence as proof of his injury; but to prove what he said the conductor did in order to attach the blame to the latter, and in his absence, is a distortion of the rule which permits the declaration of a party to be given in evidence. How can this statement be claimed to have been a part of the transaction between the respondent and the conductor when the affair was at an end, and the latter party

probably a mile away at the time? I am unable to indorse any such view. The statement of the respondent at the time referred to, as to how he came off the cars, is as undoubtedly hearsay evidence as any narration of the affair he has given since that time. It occurs to me that courts at *nisi prius* would have but little difficulty in determining when the statements of a party in such cases were admissible as a part of the *res gestæ*, or were incompetent upon the grounds that they were only hearsay, if they would consider whether the transaction to which they related was continuing when they were made, or terminated at the time, and make that the test of the matter; and I believe that much of the embarrassment they labor under in applying the rule in such cases has arisen in consequence of an attempt that has frequently been made to stretch the *res gestæ* doctrine to an unnatural extent in order to suit some supposed meritorious case, and which has led to the great diversity of decisions and confusion of the law upon that subject.

The rule is very properly stated in *Williams v. Bowdon*, 31 Tenn. 282, in the following language: "The declarations are evidence because they are part of the thing doing; if, therefore, the thing shall have been done and concluded, declarations then made are not evidence." This is in consonance with the rule as declared in the provision of the Oregon statute before referred to; but the legislatures of some of the other States have, as I view it, authorized its extension. It is declared by statute in the State of Georgia that "declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or after-thought, are admissible in evidence as part of *res gestæ*." Code Ga. 1873, § 3773. Under a provision of that character a declaration made after the transaction might be admissible; but the rule here is more restricted, and the declaration was improperly admitted.

This disposes of the case, and it would be unnecessary to say anything more if it did not have to go back for a new trial; but, as it has to take that course, it becomes our duty to pass upon other questions assigned as error. The two instructions asked for by the appellant's counsel, viz.: "(1) The burden of proving that the train belonged to the defendant is on the plaintiff; this must be shown by proof, and if not proved the defendant is entitled to a verdict whether the plaintiff was put off the train or not. (2) If the train belonged to the Northern Pacific R. R. Co., the mere fact that the conductor was paid by the Oregon Railway & Navigation Co. would not be sufficient to charge the defendant with the consequences of this injury;"—were properly denied by the court. The ownership of the train was not important; the material question was, which of the two companies was using it at the time. If it were being run by the appellant in its business at the time the affair happened, the liability would at-

INSTRUCTIONS.  
BURDEN OF  
PROOF. OWNERSHIP OF TRAIN.

tach to that company, if any such liability were created. The conductor may have been the servant of the appellant and employed in its business, although the train—that is, the property interest in it—have belonged to the Northern Pacific R. R.; the train may have belonged to the latter company, but not been under its control at the time.

The second instruction asked for, which is above stated, may be true as an abstract proposition, but it had no sufficient relevancy to the case. The real question before the jury was, whose servant was the conductor when the affair took place? That <sup>WHOSE SERVANT CONDUCTOR WAS</sup> he was paid wages by the appellant was some evidence that he was its servant at the time, and proof that the Northern Pacific R. R. Co. owned the train, doubtless tended, in a measure, to show that it had the management and control of it when the occurrence happened; but the question was not of such a nature as to require the proof of it to be left to inference. The railroad was admitted to belong to the appellant; the conductor received his pay from appellant, and, presumably, the train was at the time being used in the appellant's business. In order to rebut this presumption the appellant should have proved by direct testimony that the other company was using the road-bed and running the train in its own business and for its own use. If the appellant's counsel had asked the court to instruct the jury that "if the train belonged to the Northern Pacific R. R. Co., and, at the time of the occurrence of the affair, was in the use and employment of that company, under a contract for the temporary use of the appellant's road-bed, the mere fact that the conductor was paid by the appellant would not be sufficient to charge appellant with the consequences of the injury," he would have been entitled to have had it given, if there was any evidence before the jury tending to prove the fact; but in its present form it is too indefinite. Besides, the evidence did not justify the instruction. The payment of the conductor by the Oregon Railway & Navigation Co. was not, under the evidence, "the mere fact" showing that it had no further connection with the train; there was the other fact before the jury, which was conceded, to wit, that said last-named company was the owner and proprietor of the road itself at the time the event happened.

The court, after charging the jury that it was conceded in the case that just previous to the accident the respondent was on board the train and attempting to ride to Portland thereon without paying fare, and that, under those circumstances, the agents of the company had a right to put him off if he refused to pay such fare, using reasonable care and caution in so doing, and that if, in putting him off under such circumstances, the respondent was injured without negligence or blame upon the part of the appellant, then it was not liable for such injury; but it was its duty to first stop

the train, and then put the respondent off; and if the appellant, through its agent, put the respondent off while the train was still in motion, and thereby caused the injury, the appellant would be liable therefor; and that, if the jury found that the injury to the respondent was caused by the negligence or wilful misconduct of the appellant, committed through its agent, and that the respondent did not contribute to it by his own negligence, they should find for the respondent, and that the measure of damages would be (1) for the expense of procuring the necessary medical attendance, to an amount not exceeding \$150—the sum alleged; (2) for the necessary expense of securing care and nursing, to an amount not exceeding \$309; (3) for bodily suffering, impaired working capacity, mutilation, and disfigurement necessarily resulting from the injury; (4) for such mental suffering, apprehension, and anxiety as necessarily result from the injury—proceeded to instruct them, as a fifth item of damages, that if they should find from the evidence that the injury was malicious and wilful, or was caused by gross and wanton negligence, amounting to a total disregard of all social obligations, they would allow such sum as they would deem just and proper by way of punishment, and to deter others from such malicious, and grossly and wantonly negligent, acts in the future.

This last instruction was excepted to by the appellant's counsel, and it becomes our duty, as before indicated, to consider its correctness. It has in many instances been seriously questioned whether exemplary or punitive damages could properly be allowed in any private action. It would be extremely difficult, if not impossible, to give any good reason for such allowance, since the rule giving actual damages has been so liberally construed; but, however that may be, it seems to have attached itself to our jurisprudence, and we are made recipients of its benefits and compelled to endure the hardships it imposes. However, I am opposed to extending the rule to cases to which it was never intended to apply, and would work injustice if the application were enforced. When the conduct of a person has been wilful, malicious and wanton, or reckless, and an injury has resulted to another in consequence of it, a jury might, with a semblance of reason, in an action to recover damages for such injury, assess something more than a mere compensatory sum therefor. That course, doubtless, would have a salutary effect in two respects: would visit the wrong-doer with wholesome punishment, and afford an example calculated to deter others from the commission of malevolent acts; but to attempt to extend the doctrine so as to visit the punishment upon innocent parties, is, to my mind, unreasonable and unjust. I cannot see any principle upon which an employer, whether a natural or artificial person, can be made liable for the acts of his or its servant, beyond compensatory damages,

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unless the employer directed the doing of the act, or ratified it after it was done. In the case at bar the railroad company had been guilty of no wanton or reckless act in the premises, whatever its conductor may have done; then why should it be punished? It is made liable for damages by the acts of its conductor, by reason of the duty it owes to the public. It has impliedly stipulated to observe certain duties and obligations—among them that it will transport passengers upon its train of cars safely and with reasonable dispatch, and that it will insure them proper treatment while in transit; and its duty and obligation may be violated through the acts of its employees. The act of the conductor, whether it be negligent, malicious, or reckless, will effect such violation the same in the one case as in the other. Should the conductor wantonly and cruelly mistreat a passenger, the company is made liable, not strictly for the act of the conductor, but for the reason that the company has failed to perform the duty it undertook, and the obligation it tacitly agreed to observe.

The acts of the conductor in the present case may have been so malicious and reckless as to indicate a depraved mind, and if such were the fact, he ought to be punished for his wickedness; but by what rule of consistency can that punishment be inflicted upon the company? It did not obligate itself that it would not engage the services of any one who would never display malice or exhibit recklessness, and it should not be made answerable for the sins of the conductor, except so far as they effected a breach of its contract before referred to. It is claimed, however, in the decisions of the courts, which hold that a railroad company is liable to exemplary or punitive damages, that the conductor of a train of cars is *pro hac vice* to be regarded the company itself; but this certainly is only a fiction of law. The fact that the company acts through agents in the transaction of its business, is no more peculiar than where a natural person transacts his business through agents. The conductor usually has no pecuniary interest in the company beyond the stipend he receives for his services; he is not punished by the judgment against the company, whatever may be the amount of it. Corporations acquire their vitality by subscription for its capital stock. In this State one half thereof must be subscribed before it is allowed to engage in the business proposed in its articles, then the stockholders have a meeting, and choose directors, who thereafter manage its affairs. The pecuniary interest, the real substance of the corporation, is represented by its stock; its entire assets belong to the owner of the stock. They may be persons in moderate circumstances, who have invested their surplus earnings in the purchase of the stock, relying upon dividends to be realized therefrom. It is the stockholders who are affected injuriously by a judgment against the corporation, and who are punished when exemplary damages are awarded in the



action, and, if there is any justice in a rule which allows it in such a case, I am apprehensive that I shall never be able to discover it. Different views are entertained upon the question by courts in the different States, and, while those of quite a number of them have held that such damages were allowable against a corporation for the acts of its agents, yet those of a very respectable number of the other of the States have maintained to the contrary. I think the rule upon the subject laid down in *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, the correct one, which makes the master liable for such damages when he is chargeable with gross neglect in the employment or retention in his services of an incompetent servant, knowing at the time of his unsuitability, or that he authorized or ratified the act of the servant in the particular case. The question as to whether the complaint is sufficient to permit the recovery of that character of damages in the case need not, under the view taken of the last point, be decided. It will not be amiss, however, to suggest that, in order to recover exemplary damages in any case, it must appear from the complaint, either by direct averment or from necessary inference, that the act occasioning the damages was done maliciously, or was the result of the wilful misconduct of the defendant, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

The judgment appealed from is reversed, and the case remanded to the court below for a new trial.

LORD, J., concurs, except as to the last point discussed.

WALDO, C. J., dissented.

**Punitive Damages—Corporations.**—There is a conflict of authority as to whether punitive damages may be allowed against a corporation for the grossly negligent or wanton act of its servant, when the corporation was in no wise responsible for the act. The New York rule on the subject is contained in the following extract from the case of *Cleghorn v. New York Cent. etc., R. R. Co.*, 56 N. Y. 44: "For the purposes of the case, the following rule may be laid down as fairly deducible from the authorities, viz.: For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite: it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer, or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury

to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." This rule is followed in the principal case. See also the following cases in accord with the New York case: *Craker v. Chicago, etc.*, R. R. Co., 36 Wis. 657; *The Amiable Nancy*, 3 Wheat. 546; *Hagan v. Providence, etc.*, R. R. Co., 3 R. I. 88; *Wardrobe v. California Stage Co.*, 7 Cal. 118; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657; *Keene v. Lizardi et al.*, 8 La. Rep. O. S. 32; *Boulard v. Calhoun*, 13 La. Ann. 445; *Hill v. New Orleans, etc.*, R. R. Co., 11 Ibid. 292; *Nashville, etc.*, R. R. Co. v. *Starnes*, 9 Heisk. Tenn. 52; *Milwaukee, etc.*, R. R. Co. v. *Finney*, 10 Wis. 388; *Turner v. Railroad Co.*, 34 Cal. 594; *McKeon v. Citizens R. R. Co.*, 42 Mo. 79; *Ackerson v. Erie R. Co.*, 32 N. J. L. 254; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 446; *Great Western R. R. Co. v. Miller*, 19 Mich. 205; *Jones v. Burgett*, 46 Tex. 272. The cases all go on the theory that the principal cannot be punished for the wickedness or malice of an agent. In the case of *Hagan v. Providence, etc.*, R. R. Co., *supra*, the court point out very pertinently that, in as far as punitive damages are inflicted in the interests of society to redress the wrong it has suffered by reason of the wanton or malicious act, the principal is as much injured by the criminality of the act as any other member of society.

**Corporations Held Liable in Punitive Damages for the Unauthorized and Unratified Wanton or Grossly Negligent Acts of their Servants.**—In a large number of cases, however, it is held, contrary to the principle of the cases above cited, that a corporation is liable in punitive damages for the wrongful act of a servant, in cases where punitive damages could be recovered against the servant. Perhaps the leading case in support of this view is *Goddard v. Grand Trunk Railway*, 57 Me. 202. Part of the opinion of the court in that case is quoted at length as presenting the arguments in favor of the view. "We confess it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers: it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence called a corporation. And yet under cover of its name and authority there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks,—since, in fact, no corrective influence can be brought to bear upon them except pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains

into open draws; and careful baggage men can be secured who will not handle and smash trunks and bandboxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured." In *New Orleans, etc., R. R. Co. v. Bailey*, 40 Miss. 395, which supports the doctrine of the Maine case, the court base their opinion on the theory that the doctrine of "respondent superior" not only makes the act of the servant that of the master, but also transfers the motive of the servant to the master. The Maine court probably had the same idea in mind when it said that a corporation has no mind or voice or hand but those of its servants.

The following cases support the doctrine of the Maine case. They are all cases where the corporation was punished with punitive damages for the act of its servant where no moral responsibility for the act rested on the corporation—where the act was unauthorized and unratified, and the company was in no wise negligent in its selection or retention of the servant: *Atlantic & Great Western R. R. Co. v. Dunn*, 19 Ohio St. 162; *Quigley v. Central Pacific R. R. Co.*, 11 Nev. 350; *Baltimore, etc., R. R. Co. v. Blocher*, 27 Md. 277; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; 38 Ind. 116; *Perkins v. Mo., K. & T. R. R. Co.*, 55 Mo. 201; *Maleek v. Tower Grove, etc., R. R. Co.*, 57 Mo. 17; *Doss v. Missouri, Kansas & Texas R. R. Co.*, 59 Mo. 27; *Chicago, etc., R. R. Co. v. Burke*, 53 Miss. 200; *Western Union Tel. Co. v. Eyser*, 2 Colo. 142; *New Orleans, etc., R. R. Co. v. Bailey*, 40 Miss. 395; *Graham v. Pacific R. R. Co.*, 66 Mo. 536; *Evans v. St. Louis, etc., R. R. Co.*, 11 Mo. App. 463; *Gasway v. Atlanta, etc., R. R. Co.*, 58 Ga. 216. See, also, *Milwaukee, etc., R. R. Co. v. Arms et al.*, 91 U. S. 489; *Chicago, etc., R. R. Co. v. Bryan*, 90 Ill. 126.

In Kentucky, by statute, in actions against a railroad company for the killing of a person by the railway or its servants, punitive damages are allowed, where the act resulting in the killing was wilful. *Jacobs v. Louisville, etc., R. R.*, 10 Bush. (Ky.) 263; *Louisville, etc., R. R. Co. v. Mahony Adm'r*, 7 Bush. (Ky.) 235; *Bowler v. Lane*, 3 Metc. (Ky.) 311. See, also, *Haley v. Mobile, etc., R. R. Co.*, 7 Bax. (Tenn.) 239.

In Illinois it is apparently held that a corporation is liable in *punitive damages* for the wanton and wilful act of its servant, but not for the servant's negligent act, however grossly negligent it may be. *Illinois Cent. R. R. Co. v. Hammer*, 72 Ill. 347; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455.

An examination of the reasoning quoted above from the case of *Goddard v. Grand Trunk Railway* will, it is thought, show it to be unsatisfactory. The idea that a corporation cannot act except through its agents, and that therefore the acts of the agents are the acts of the corporation, is not sound. The corporation can act by itself (*Morawetz Corp. s. 33 et seq.*; see, also, dissenting opinion of *Tapley*, 57 Me. 228, 241); and there is no more reason for identifying it with its servants in the manner suggested by the court than there is for identifying any other principal with its agents or servants. It is true that acts done by an agent or servant authorized or ratified by the master are to be regarded in a legal sense as the acts of the master. Again, tortious acts of a servant, done while acting within the scope of his employment, involves liability on the part of the master, though not authorized or ratified by him. This is probably on the theory that public policy requires the master to be held liable for the act of his servant, and not on any theory of identification of master and servant. *Sharrod v. London, etc., R. R. Co.*, 4 Exch. 580. But assuming that there is this identification of master and servant in regard to all acts done by the servant while acting within the scope of his employment, is it anything more than a mere legal fiction created in order to

explain a liability on the part of the master which it is the policy of the law to impose? It would seem clearly not; otherwise if the act of the servant were criminal the master would be punishable for the crime. If this theory of identification of master and servant is a mere legal fiction, then all technical legal arguments to be derived from it in support of the theory of the liability of the master for punitive damages fall to the ground. For, in order that the theory of identification may apply, the identification must be actual and real, and not a mere legal fiction. The only argument which can be derived from the theory of identification of master and servant is one grounded on public policy,—that the law has seen fit, from motives of policy, to identify the master with the servant as to tortious acts done in the scope of his employment; that policy, also, demands that this fiction of identification be pushed far enough to make the master liable for punitive damages for acts done by a servant within the scope of his employment, and for which the servant would be liable in punitive damages. It may well be that when the master is in any way at fault for the wanton or grossly negligent act of the servant—as when he knowingly employs or retains a drunken or incompetent servant—public policy demands that he should be amerced in punitive as well as compensatory damages for the act of his servant. Indeed, this was admitted in the case of *Cleghorn v. New York Cent. R. R.*, *supra*. But that a master should in any case be punished for the wickedness or carelessness of another, he not being at fault himself in the slightest degree, is simply monstrous. For an able refutation of the reasoning of the court in *Goddard v. Grand Trunk R. R.*, see the dissenting opinion of Tapley, J.

**Exemplary Damages for Compensation, not Punishment, may be awarded against a Corporation.**—In States where exemplary damages are allowed, on the theory of a more liberal scale of compensation, and not on the theory of punishment, there is perhaps less reason to question the propriety of allowing exemplary damages against a master for the acts of his servant. *Hawes v. Knowles*, 114 Mass. 518. See, also, *Hopkins v. Atlantic & St. Lawrence R. R. Co.*, 86 N. H. 9.

**Ratification by a Corporation of Acts of Servants Punishable with Punitive Damages makes the Corporation Liable in Punitive Damages.**—It is generally held that where the servants of a corporation have committed a tort punishable with punitive damages, the corporation may, by ratification of such act, make itself liable in punitive damages. *Nashville, etc., R. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52; *Milwaukee, etc., R. R. Co. v. Finney*, 10 Wis. 388; *Illinois Cent. R. R. Co. v. Hammer*, 72 Ill. 347; *Craker v. Chicago, etc., R. R. Co.*, 36 Wis. 657; *Bass v. Chicago, etc., R. R. Co.*, 42 Wis. 654.

**Retention of the Servant who committed the Wrongful Act, and Especially his Promotion, are Evidence of Ratification.**—Retention of the employee who was guilty of the wanton or grossly negligent act, and especially his promotion by the company after it knew of such act, are evidence of such a ratification of his act as will make the company liable for punitive damages. *Bass v. Chicago, etc., R. R.*, 42 Wis. 654; *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202; *Perkins v. Missouri, Kan. & Tex. R. R. Co.*, 55 Mo. 201. But, *contra*, see *Edelman v. St. Louis Transfer Co.*, 3 Mo. App. 503.

**Municipal Corporations not Liable in Punitive Damages.**—A municipal corporation is not liable in exemplary damages for the wanton or malicious act of its servant. *Chicago v. Jones*, 66 Ill. 849; *Chicago v. Langlass*, 53 Ill. 256.

## SOUTH AND NORTH ALABAMA R. R. Co.

v.

SCHAUFLEER.

(75 *Alabama*, 196.)

Where, in an action by a passenger against a railroad company, to recover damages for personal injuries, the complaint alleges that the plaintiff "was compelled and forced by the agents of said defendant to get off defendant's train while in motion, and before said train had reached the usual place at the depot," and that injuries sustained by him were produced by the negligence of defendant's agents "in compelling and forcing" him to get off the train, the gravamen of the action is the alleged force, and if not sustained by evidence merely; that, when the train was approaching the platform at the depot, the conductor came towards him in the car, crying out the name of the station, and saying, "We have got no time, hurry up," and that this was repeated by the conductor several times while the plaintiff was making his egress from the car, and before he stepped from the moving train; such words not being susceptible of a construction which would impute to the conductor any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself in the slightest peril in leaving it.

A passenger on a railroad train, who, encumbered with hand-baggage, steps from the train on a dark night, while it is moving at the rate of six or eight miles per hour, before it has reached the platform of a regular station, at which he was to get off, and with the locality of which he is acquainted, against the advice of the conductor, and without reason to believe that the train would not stop, as usual, at the platform, is guilty of contributory negligence, which bars him from recovering damages for personal injuries sustained in stepping from the train.

Where an adult passenger leaves a moving train under the advice or direction of the conductor in charge of the train, and, in leaving the train, receives personal injuries, it seems to be settled by the authorities, that such advice or direction, though plain and unambiguous, cannot be held to excuse an act of negligence on the part of the passenger, which is so opposed to common prudence as to make it an obvious act of recklessness or folly.

It seems also to be settled by the authorities, that if, in such case, the act advised to be done is one, in the doing of which the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused.

APPEAL from Cullman Circuit Court.

Tried before Hon. LeRoy F. Box.

This was an action by Charles Schaufler against the South & North Alabama R. R. Co., a domestic corporation, to recover damages for personal injuries sustained by him while a passenger on the defendant's train. The defendant's pleas are not set out in the record, but the judgment entry recites that the cause was tried on issues joined on the plea of not guilty and on a "special plea of contributory negligence." The trial resulted in a verdict and

judgment for the plaintiff; and from the judgment rendered the defendant took this appeal. The facts disclosed by the evidence, so far as necessary to an understanding of the points decided, are sufficiently stated in the opinion. The first and fifth charges referred to in the opinion, as having been requested by the defendant, and refused by the court, are as follows: 1. "If the jury believe the evidence, they will find for the defendant." 5. "The court charges the jury, that if they believe from the evidence, that the plaintiff, Schaufler, was not forced and compelled to get off defendant's train in any other manner than as testified to by himself, then he cannot recover in this action, and they must find for the defendant." The defendant reserved exceptions to the refusal to give these charges, and also to several charges given at the plaintiff's request, which the opinion does not render necessary to set out.

The rulings above noted are among the errors here assigned.

*Thos. G. Jones and J. M. Falkner for appellant.*

*H. L. Watlington contra.*

SOMERVILLE, J.—The present suit is one for damages, instituted by the appellee, who was a passenger on the defendant's railroad train, having paid his fare for transportation to Cullman, a station or depot on the line of the road within this State. The averment of the complaint is, that the plaintiff, without any fault of his own, "was compelled and forced by the agents of said defendant to get off defendant's train while in motion, and before said train had reached the usual stopping place at said depot," and that the plaintiff's injury was produced by the negligence of defendant's agents "in compelling and forcing said plaintiff to get off defendant's train." It is obvious that the whole gravamen of the action is made to lie in the alleged forcible ejection of the plaintiff from the passenger car by the agents or servants of the defendant railroad company. Whether the complaint be regarded, in form, as declaring in trespass or trespass on the case, is immaterial. It is equally unimportant that the averment in question was unnecessary in order to have fixed the liability of the defendant. It was necessary to allege some act of wrong on the part of defendant, or its agents, some act of omission or commission, constituting a tort, or breach of legal duty, before a recovery could be had by the plaintiff. This was requisite in order that the defendant might have notice of the nature of the case which he was called on to defend. The plaintiff has elected to state his own ground of action, and if, in doing so, he has stated a particular fact, and, by his mode of statement, has inseparably connected it with the substance of the issue, so as to render proof of it essential, it is a misfortune of his own, which cannot be justly visited upon his adversary.

We fail to discover in the record any evidence tending to sup-

port this averment of the complaint. There is no fact stated which tends to prove that the plaintiff was compelled or forced in any manner by defendant's agents, or by any one else, to leave the train. The only part of the evidence which is invoked in argument, as giving any color of support to this view of the case, is the statement testified to by the plaintiff himself, that when the passenger train was approaching the platform at the station, the conductor came towards him in the car, where he was seated, crying out the name of the station and saying, "We have got no time, hurry up!" and that this ejaculation was repeated several times while the plaintiff was making his egress from the car and before he stepped from the moving train a few minutes afterwards, thus receiving his injury. It is not only proper, but it becomes necessary for us to say that those words, alleged to have been used by the conductor, are not susceptible of a construction which would impute to him any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself in the slightest peril in leaving it. There was, for this reason, a material disagreement between the allegation of the complaint and the proof, which constituted a fatal variance. The substance of the issue, as made by the pleadings, is unsupported by any evidence found in the record. The court erred, therefore, in refusing to give the first and fifth charges requested by the defendant, which properly raise this feature of variance. The several charges also given at the request of the plaintiff, which seem to have been based upon the supposed existence of any force, compulsion, or terror exercised by the conductor upon the plaintiff, were clearly misleading, and should not have been given.

In view of the errors above stated, the judgment of the circuit court must be reversed, and the cause remanded. We proceed to state a few principles, pertinent to the rulings of the court as found in this record, which may serve to facilitate the promotion of justice, and for the guidance of the court and jury upon another trial.

It is plain that the first inquiry must be as to whether the agents of the defendant have been guilty of any tort, wrongful act, or negligence, which has resulted in producing the injury received by the plaintiff. If there has been no wrong-  
NEGLIGENCE ES-  
SENTIAL TO AC-  
TION.

ful act of omission or commission, such as constitutes a violation of legal duty on the part of the defendant, or its agents who were in charge of the train at the time of the accident, no recovery of damages by the plaintiff can be had, whatever may be the extent of his injury. So, if it be shown that the defendant or its servants were guilty of such wrongful act, but that this act had no legal connection with the injury received, so as to have operated to produce it as a natural and proximate consequence, there is no liability cast on the defendant, and this must be an end of the case.

If, however, it is ascertained that the defendant or its servants have been guilty of some wrong or negligence, the question then is:

**CONTRIBUTORY NEGLIGENCE OF PASSENGER.** (1) Whether the damage complained of was occasioned entirely by the negligence or wrongful act of the defendant, or such servants; or (2) whether the plaintiff, by his own negligence, or want of ordinary care and prudence, has so far contributed to his own misfortune, that, but for such contributory negligence on his part, the misfortune or injury complained of as the basis of his action would not have happened. Ala. Gr. S. R. R. Co. v. Hawk, 72 Ala. 112; 18 Am. & Eng. R. R. Cas. 194, and cases cited; Railroad Co. v. Jones, 95 U. S. 439. In the first contingency the plaintiff may be entitled to recover, but in the second he is not.

**REMARKS OF CONDUCTOR AS TO GETTING OFF ADMISSIBLE.** In considering the question of contributory negligence on the part of the plaintiff, it is competent for the jury to consider what was said by the conductor at or about the time of the accident. If the testimony of the conductor, McCanta, be taken as true—which seems to be fully corroborated by Johnson, the conductor of the sleeping car—asserting that he told the plaintiff to “hold up, the train was going to stop,” it is quite apparent that the injury received by the plaintiff was the result of his own want of prudence and caution, without which it could not have happened, and that he would be barred of a recovery. The law would not tolerate that a passenger, who was encumbered with articles of hand-baggage, should prematurely step from a train of moving cars in the darkness of night, while running at the speed of six or eight miles per hour, against the advice of the conductor in charge, when he had no reason to believe that the train would not stop as usual at the platform of a regular station, with the locality of which he is shown to have been acquainted. This would be an act of carelessness by which he himself might clearly be adjudged to be the author of his own injury. Shear. & Red. Negl. §§ 281, 283; Central R. R., etc., Co. v. Letcher, 69 Ala. 106; s. c., 12 Am. & Eng. R. R. Cas. 115; Ala. Gr. Sr. R. R. Co. v. Hawk, 72 Ala. 112; 18 Am. & Eng. R. R. Cas. 194; Gothard v. Ala. Gr. So. R. R. Co., 67 Ala. 114.

The plaintiff, however, denies that he was warned by the conductor to hold up, or not to jump, but that the language used by him was to “hurry up, we have no time,” or words of this import. **CONFLICT OF EVIDENCE—JURY TO DECIDE.** This conflict in the evidence is not to be dealt with by this court, but is to be resolved by the jury upon the usual principles by which the credibility of witnesses should be determined. We have no right to assume that they will not do this upon their consciences as upright men, free from the influence of every prejudice, as it will be their sworn duty to do. If, in the discharge of this duty, they can justly arrive at the conclusion that the statement of the plaintiff on this point should be believed,



rather than that of the two other witnesses, by whom he is contradicted, the question will arise as to what effect the language used by the conductor will operate to excuse the conduct of the plaintiff, so as to exempt him from the imputation of contributory negligence. If the conductor told the plaintiff to "hurry up, we have no time," would this excuse the premature egress of plaintiff from the passenger car, in a manner which would have been an act of inexcusable negligence without such direction or declaration by the conductor?

There are numerous cases where the question has been considered as to the effect of advice or directions given to passengers by conductors, or others in the management of vehicles and railroad trains. Two propositions seem to be settled by the authorities, which may be stated as follows: First, such advice, even though plain and unambiguous, cannot be held to excuse an act of negligence on the part of an adult passenger, which would be so opposed to common prudence as to make it an obvious act of recklessness or folly. *Railroad Co. v. Jones*, 95 U. S. 439; *Shear. & Red. Negl.* § 282. Second, where the act advised to be done is one where the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused. *Lambeth v. N. C. R. R. Co.*, 66 N. C. 494; *Cleveland, etc., R. R. Co. v. Manson*, 30 Ohio St. 451; *McIntyre v. N. Y. Cen. R. R. Co.*, 37 N. Y. 287; *Penn. R. R. Co. v. McCloskey*, 23 Penn. St. 526; *Woods' Fields' Corp.* (2d Ed.) § 497, p. 756, note.

We cannot know under which of these principles the case may be made to fall by the evidence introduced on another trial. We do not seek, therefore, to make any application of them in detail. This we leave to the wisdom of the court below, without further discussion.

Reversed and remanded.

**Advice by Conductor or Brakemen to Passengers to Alight from moving Train—Contributory Negligence.**—The question whether one injured by jumping from a train while in motion was guilty of contributory negligence in so jumping, is one that depends upon the special facts and circumstances of each case, and, therefore, in general, is a question which must be left for the jury, unless the facts are so strong as to preclude all possibility of doubt on the question. *Note to Cincinnati, etc., R. R. Co. v. Peters*, 6 Am. & Eng. R. R. Cas. 136. The fact that the passenger was advised or told by train employees to jump, or was told by them that it was safe to jump, etc., is merely an evidentiary fact or circumstance bearing on the general question of contributory negligence in jumping from the train while in motion, and should be considered by the jury in passing upon that question. *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 47; *Pittsburgh, etc., R. R. Co. v. Krouse*, 30 Ohio St. 222; *Jeffersonville R. R. Co. v. Swift*, 26 Ind. 459; *Lambeth v. North Car. R. R. Co.*, 66 N. C. 494; *Texas & Pacific R. R. Co. v. Murphy*, 46

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Tex. 356 (case of getting on car); Southwestern R. R. Co. v. Singleton, 66 Ga. 252.

The mere fact that the conductor or brakeman advised or even ordered or directed plaintiff to leave the train while in motion, does not *per se* relieve him from the necessity of exercising any independent judgment in the matter of jumping, and remove every imputation of contributory negligence on his part. Jeffersonville R. R. Co. v. Swift, 26 Ind. 459; Chicago, etc., R. R. Co. v. Randolph, 53 Ill. 510. See *dictum contra* in Filer v. New York Central R. R. Co., 59 N. Y. 351.

The law on this subject is well stated in 2 Wood Ry. Law, 1151. "While it is true that the passenger must measurably use his own judgment as to whether or not it is safe for him to alight from a moving train, yet the question as to whether he is justified in yielding his judgment to the supposed superior knowledge of the company's servants, who from long practical experience are presumed to be better competent to judge of the safety in doing so, and alighting at their invitation or advice, is one which must largely depend upon the circumstances of such case; and the controlling element is the speed at which the train was moving at the time, and the physical condition of the passenger. A passenger would not under any circumstances be justified in yielding to such advice when the train was moving at a high rate of speed; nor would a person who is lame, or laboring under any serious disability resulting from age, disease, or other cause, be justified in getting off the train while it is moving at all. In these cases the passenger must think before he acts, and he is bound to think and act as a person of ordinary prudence would do under the same circumstances; so that in all these cases the question is, whether under the circumstances of the case, the passenger was, as a prudent person, justified in acting upon the invitation or advice of the agents of the company, or should have acted upon his own judgment and remained in the car."

It may also be suggested that the degree of strength of the language used by the employee has an important influence on the question of contributory negligence. The language of the conductor may amount to no more than a vague intimation of an opinion that it is safe to jump, or it may be so strong as to amount practically to a command. Chicago, etc., R. R. Co. v. Hazzard, 26 Ill. 373, 382; Georgia R. R. & Banking Co. v. McCurdy, 45 Ga. 288.

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### HARDING

v.

### CHICAGO AND GRAND TRUNK R. R. Co.

(*Advance Case, Michigan. May 13, 1885.*)

Where the complaint, in an action against a railroad company, claims damages for a tortious expulsion of a passenger in the night-time from a train, producing bodily harm, and the evidence makes out a case of injury from exposure caused by an unreasonable detention, and the deprivation of proper facilities for care and shelter, the variance is material, and a verdict cannot be sustained.

ERROR to Kalamazoo.

Howard & Roos for plaintiff.

Edwards & Stewart for defendant and appellant.

CAMPBELL, J.—Plaintiff sued and obtained judgment below for \$1500, as damages incurred by reason of exposure and consequent sickness, which he claimed resulted from the FACTS. wrong of defendant in failing to leave him at the station at Schoolcraft when the train on which he rode passed there, so that when it returned and backed down to let him off, there was no vehicle to meet him, and he was compelled to walk home in cold and stormy weather, and his health was broken by exposure.

The facts which the jury must have found were in substance that plaintiff, on November 16, 1882, being quite ill with fever, got on defendant's night train going eastward at Chicago, having a proper ticket to Schoolcraft, where the train was due between two and three o'clock in the morning of November 17, 1882. His malady and the remedies given for it dulled his hearing, and when the conductor came for his ticket he so informed the latter, and was promised that he should be informed of his arrival and put off at Schoolcraft. The train passed the station without warning to him, and under the charge the jury must have found without adequate warning to passengers at all. The train conductor and brakeman stated that it stopped long enough for passengers to get off, and fixed the time at about 20 to 25 seconds. Plaintiff and other witnesses, including the person who went to the station to meet him, swore it did not stop at all. After going on for a distance, stated by the conductor to be about three quarters of a mile, the conductor and brakeman entering the car, which had very few passengers in it, noticed him, and referred to him as the man who ought to have been left at Schoolcraft. This roused his attention, and he urged very strenuously to be taken back there, as he was sick and anxious to reach home, and offered to pay anything for that purpose. There is a dispute concerning some of the incidents. His statements charge some very annoying conduct, which is denied. He swears the conductor took pay himself from his pocket-book. It is testified on the other side that he offered money, which was refused, and that he put five dollars in the conductor's pocket. There is also a dispute as to whether anything was done towards backing up before this money was so paid or handed over. The train was then backed up to Schoolcraft and plaintiff was put off, as he claims, some distance from the platform; and as the conductor and men testify, in the usual place. The depot was shut and had been when the train passed, and the carriage sent for him had left after the train had passed on, when it first reached the station. It was originally behind time, by reason of a delay further west, but this became of no importance except as bearing on the question of stopping. After getting off, plaintiff, who was feeble and anxious to get help, was unable to find any place of refuge or shelter, except the target house, and after knocking there, the target-keeper, at his request, went with him a part of the way towards his home,

which was in the village, about three fourths of a mile off. Being recalled by signal to attend to a train, he left plaintiff, who by occasional rests was able to get home slowly, and reached his house about five o'clock, exhausted. The night was cold and rainy, and the rain froze upon his blanket and clothing. On reaching home, or shortly after, he was attacked by pains and nervous movements, which developed into a severe case of cerebro-spinal meningitis, which the testimony attributed directly to the exposure. The consequences were very serious, and produced lasting mischief. The money taken by or paid to the conductor was sent to plaintiff's house shortly after, but not accepted by his wife, and he was not in a condition to be seen. This money was not made important on the trial, and the damages were asked and given for the serious injury which followed on the exposure.

The case was argued by plaintiff's counsel, but submitted on printed argument for the defence, who brought error. Apart from some minor questions, in which we discover nothing important, the main controversy was made upon the question of damages, the defence claiming the only very serious injury as too remote from the wrongs alleged.

On examining the grounds relied on by the defence, the objection is presented that the case made by the declaration does not indicate the grounds of recovery which were made prominent upon the trial and in the charge. The substantial grievance now relied on, and which led to the verdict, was that, by passing the station when it should have stopped, the departure of the train led the persons who were waiting with plaintiff's carriage to suppose he was not there, or could not be put off there, so that they left the station, and on his return there was no one to take charge of him; and, in the absence of any shelter or conveyance, he was compelled to walk home while in no condition to do so, and injured by the exposure and exhaustion which he could not avoid, and which would be a natural, and is claimed to have been a direct, consequence of what was done.

The declaration puts the whole weight of the mischief on other grounds. Both courts dwell upon an alleged wrongful putting him off the train at a place remote from the depot. The first count charges nothing else as a cause of bodily injury than a tortious putting him off at a place five miles from the station, although it recites the previous grounds of aggravation and misconduct. The second count recites the facts quite fully, and as the jury must have substantially found them, up to the time of the backing of the train, but concludes this recital by a similar charge of wrongful and forcible expulsion at a remote place, whereby he was bruised and otherwise injured, and sustained consequent mischief. In both of these counts the physical injury was laid entirely to the forcible and tortious expulsion at a

EXPULSION PRO-  
DUCING BODILY  
HARM—EXPO-  
SURE FROM DE-  
TENTION—VAR-  
IANCE.

place remote from the right one, and nothing whatever is said about the suffering which was due to the exposure consequent on the absence of means of shelter and conveyance, that was caused by the failure to let him off when the train arrived in the first place. The difference is obvious between the consequences of a tortious expulsion producing bodily harm and those of exposure from an unseasonable detention, and the deprivation of proper facilities for care and shelter, which do not appear in the alleged causes of bodily peril or injury.

The mere distance from the platform, and placing on the wrong side of the track, were not shown in themselves to have led to any immediate mishap. Neither was there any evidence of physical violence that entered as a serious element into the account in computing damages. There was no such variance in the facts sworn to as to render any of the testimony concerning the transactions immaterial, but the chief foundation of damages recovered was entirely different from that charged in very material particulars. Without an amendment, the rule applied was inapplicable, because no appreciable mischief was traced to the place or manner of putting plaintiff from the train, and no averments laid the worst grievance to anything else.

The record, in its present condition, does not present the question of remoteness of damages in such a shape that we can intelligently deal with it, and the judgment must be reversed, and a new trial granted, because the principal damages recovered were not directly or remotely connected with the grievance alleged.

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### TEXAS AND PACIFIC R. R. Co.

v.

BOND.

(62 *Texas Reports*, 442.)

The strict rule which authorizes the conductor on a railway train to eject therefrom a passenger who refuses to pay his fare, is confined to wilful violators of the contract. It does not apply where a passenger tenders as his fare the sum he has been accustomed to pay on the same road, and who does not wilfully refuse to pay the full fare demanded of him by the conductor.

A railway conductor cannot act on the assumption that an apparent unwillingness to pay the regular passenger fare on the railway is an absolute and wilful refusal to pay fare, and thereupon put the passenger off the train. Though the passenger, under a mistake as to the proper amount which should be paid, declines to pay the amount of fare demanded, yet time should be allowed him to tender and pay after taking steps to stop the train to put him off, where he does not wilfully persist in his refusal.

APPEAL from Kaufman. Tried below before the Hon. Green J. Clark.

Plaintiff brought suit to recover damages for being ejected from defendant's train, and alleged that on the 28th day of October, 1883, he entered defendant's train at Elmo to be carried to Terrell; that after going about a mile, defendant, after receiving from him twenty cents, a part of the fare, declined to receive any further sum for such fare,—though the same was tendered to the conductor,—and with force and violence ejected him from the train at a point other than the usual stopping place, thus compelling him to walk a distance of six miles, whereby he was greatly injured in his person, feelings, and estate; that this ejection was done in the presence of a large number of people, and in an insulting, rude, wanton, and malicious manner, and that defendant ratified the said acts of its conductor although it well knew that he was a person of turbulent, quarrelsome, and oppressive disposition, and disposed to insult, abuse, and oppress passengers, and unfit to be a conductor of a passenger train.

In a trial amendment plaintiff alleged, in substance, that after getting on the train he paid the conductor twenty cents, which was the regular fare between said points where the passenger had a ticket; that the conductor accepted the twenty cents and then demanded ten cents more, which he claimed was due as additional fare when the passenger had no ticket; that, in compliance with such demand, plaintiff tendered the conductor the additional ten cents, which made the fare four cents per mile from Elmo to Terrell, but the conductor then refused to receive it, and ejected him from the train, as aforesaid.

Defendant pleaded, in substance, that if plaintiff was ejected from defendant's train, it was because he had no ticket entitling him to ride on defendant's train, and because he refused to pay the amount of fare prescribed by defendant and allowed by law.

Verdict in plaintiff's favor for \$154, on which judgment was rendered.

*Leake & Henry* for appellant.

*Manion & Adams* and *J. O. Terrell* for appellee.

WILLIE, C. J.—The first proposition of appellant under his second assignment of error, viz.: when the fare is paid on the train, a railroad company has the right to charge four cents per mile, is not questioned on the part of appellee's counsel.

The second proposition, which brings in question the refusal of the court to give a special charge asked by counsel for appellant, presents the only point of any importance in this case. The charge asked was as follows:

"That if they find from the evidence that the regular fare between Elmo and Terrell was thirty cents when paid on the train,

and that this was known to plaintiff on the day he was ejected from defendant's train, and further find that the plaintiff only offered to pay twenty cents for such fare, when applied to by the conductor, and showed an unwillingness to pay the regular fare of thirty cents, and told the conductor that he had better put him off, and that thereupon the conductor pulled the rope to stop the train, before he was aware that plaintiff had proposed to pay the extra ten cents, and that at the time the tender of the extra fare was made (the train) had come to a halt, or was stopping at the instance of the conductor, then the plaintiff had no legal right to tender said extra ten cents and continue his journey after he had shown such unwillingness to pay said extra fare, and after he had told the conductor to stop his train and put him off; that it is too late to offer to pay fare after the conductor has taken steps to stop the train where a passenger has refused to pay full fare."

OFFER TO PAY  
FULL FARE BE-  
FORE TRAIN  
STOPS, EFFECT.

It will be observed that this charge, taken as a whole, makes the unwillingness of a passenger to pay regular fare, coupled with the remark that the conductor had better put him off, amount to a refusal to pay his passage money. It further gives the railroad company the right to eject the passenger, under such circumstances, even if he offers to pay before the train halts, provided the conductor has taken steps for stopping it.

It is undoubtedly a general principle that "a wilful refusal to pay the proper fare justifies expulsion from the train." Thom. on Car., p. 640. The authorities seem to hold, also, that "after a person has refused to pay his fare, and is being put off the train, he acquires no right to passage by then tendering the fare demanded." Id.; *O'Brien v. Bos. & War. R. R. Co.*, 15 Gray, 20; *Hoffbauer v. D. & N. W. R. R. Co.*, 52 Iowa, 342. To bring a case within these principles there must be a wilful, or at least a positive, refusal to pay proper fare, or, in other words, a boarding or remaining upon the train with the intention of defrauding the company or resisting demands for the payment of fare. Thom. on Car., p. 640.

The distinction between such a case and the present is very apparent. Bond did not enter the car with intent to defraud the company or resist its demands for full pay. He went aboard of it expecting that he would be taken to Terrell for twenty cents, paid to the conductor as usual. He tendered that amount to the conductor in charge—with whom he had never travelled before—and upon being required to pay ten cents more, told the conductor that he had never been required to pay this additional amount, and when informed that the charge was four cents per mile when paid on the train, objected to paying it, and told the conductor, good-humoredly, if he would stop the train he would get off. This was a mere discussion between the parties, in which Bond was endeavor-

oring to persuade the conductor to allow him to make the journey for twenty cents, and the conductor was attempting to convince Bond that he could not do so, but must have the full fare required when paid on the train. It was just such a discussion as is liable to take place frequently between a conductor and a passenger. It may arise as to the validity of a ticket, or the time when it expired, or upon like subjects, in which the conductor is expected to see and know the difference between an attempt to impose upon him and a mere mistake of facts on the part of a passenger. The present conductor should have known, from the character of his discussion with Bond, the false impression as to what he would have to pay under which the latter boarded the train, and the good-humored manner in which he asked to be put off, and the small amount in controversy, and the great distance which Bond would have to walk if expelled from the cars; that he was no trespasser, and that he did not wilfully and would not persistently object to paying the fare exacted of him. He should have allowed him a reasonable time to consider as to paying the additional money, and not acted so hastily in pulling the bell and taking steps to eject the appellee from the cars. As he had acted thus hastily, and the appellee tendered the money immediately upon the rope being pulled,—the first evidence he had that the conductor really intended to eject him,—the money should have been received and the appellee restored to his rights as a passenger.

However correct the general principles announced in the charge might have been—which we do not decide—the appellant was not entitled to have them applied to the facts in evidence.

The foundation upon which these principles rest, viz., that the passenger is a trespasser and is wilfully attempting to obtain passage upon the train in defiance of the rights of the company, does not exist in such a case. A mere discussion of the propriety of making such payment under the circumstances, and raising objections to the demand of the conductor, was not a positive refusal to pay the fare. The conductor, in hastily accepting it as such, acted without proper consideration, and should not have refused payment when it was offered him immediately upon his taking the first step towards stopping the train. If the court had given the charge as asked, he would have announced it as law, that any display of unwillingness on the part of a person to pay money exacted as fare from him by the conductor, no matter what may have been the manner of that officer, nor what the character of the refusal, nor how pleasantly may have been the manner of making the suggestion as to putting the passenger off, would authorize his immediate expulsion, and cut him off from all right to continue on the train, no matter how soon thereafter he tendered his fare. We cannot accept this as law on general principles, and we know of no case in which it is sustained by the courts.



We prefer the doctrine as laid down in *Tennessee*, viz.: That the strict rule is confined to wilful violations of contract upon proper demand. It will not apply when a passenger has boarded the train under an earnest belief that he could pay his fare in a particular form, and the amount demanded is tendered while he is being ejected. *Louisville, etc., R. R. Co. v. Harris*, 16 Am. & Eng. R. R. Cas. 374.

The same rule applies when the passenger is under an honest but mistaken belief that he could obtain passage for a certain sum, and a greater rate is required of him.

It does not matter that the law allows a greater charge; it is enough that the passenger has been accustomed to travel for the amount he offers, or does not wilfully persist in paying less than the company rate when he is informed that he will be required to do so. Passengers are entitled to a reasonable time within which to comply with the conductor's demands, and he has no right to conclude that any apparent unwillingness so to do is an absolute and wilful refusal to accede to them. See *L., N. & Gt. S. R. R. Co. v. Guinan*, 13 Am. & Eng. R. R. Cas. 37.

The necessities and conveniences of railway travel neither require nor justify such haste as was used by the conductor in the present case, and as he allowed no sufficient time for making the tender after attempting to convince Bond that the additional ten cents should be paid, he should have accepted it after taking steps towards stopping the train for the purpose of expelling the appellee.

To hold differently would be to put the travelling public at the mercy of railroad employees, and subject passengers to inconvenience and damage, unless they yield implicitly to any demand, however unreasonable it might at first appear, provided it should in fact be lawful and proper.

We think that under the facts of the case applicable to the charge it was correctly refused.

As to the remaining assignment of error, it is sufficient to say that there is a conflict of testimony as to whether or not the conductor saw the money when tendered. The plaintiff's witnesses prove very conclusively that he had every opportunity of seeing it, if he did not. The plaintiff did all that he could to enable the conductor to see the money, and if it was not seen, the plaintiff should not suffer the consequences.

The judgment is affirmed.

**Affirmed.**

**Expulsion of a Passenger for Non-payment of Fare—See note to *Skillman v. Cincinnati, etc., R. R. Co.*, 13 Am. & Eng. R. R. Cas. 36.**

**21 A. & E. R. Cas.—27**

## ATCHISON, TOPEKA AND SANTA FE R. R. Co.

v.

WEBER, Adm'r, etc.

*(Advance Case, Kansas. May 8, 1885.)*

In an action brought against a railroad company, in behalf of the next of kin, by the personal representatives of a deceased person, to recover damages for injuries resulting in the death of such person, nominal damages may be recovered, if it appears that his death was caused by the wrongful act or omission of the defendant, although no actual pecuniary damages may have been shown or suffered.

It is the duty of a railroad company carrying passengers to provide for their quiet and comfort, and secure them against the annoying and offensive conduct of other passengers; and where the conduct of a passenger is such as to render his presence dangerous to fellow-passengers, or such as will occasion them serious annoyance or discomfort, it is not only the right but the duty of a railroad company to exclude such passenger from its train.

Where an unattended passenger, after entering upon a journey, becomes sick and unconscious, or insane, it is the duty of a railroad company to remove him from the train, and leave him until he is in a fit condition to resume his journey, or until he has obtained the necessary assistance to take care of him to the end of the journey.

The duty of the railroad company to such a passenger does not end with his removal from the train, but it is bound to the exercise of reasonable and ordinary care in temporarily providing for his protection and comfort; and *held*, that the railroad company may have exercised due care towards such a passenger, who is without friends or money, when it carefully and prudently removes him from its train, and promptly places him in charge of the overseer of the poor. The statute makes it the duty of an overseer of the poor in any township or city to grant temporary relief to any non-resident who may be found lying sick therein, or in distress, and without friends or money, and the expense of providing such relief is to be paid out of the county treasury.

Where a jury return important and material special findings, upon which the general verdict may have been mainly founded, that are not true, and which are inconsistent, their verdict should be set aside and a new trial granted.

**ERROR** from Atchison county.

Action brought by Conrad Weber, as administrator of the estate of Philip Weber, deceased, under section 422 of the Civil Code, to recover damages on account of the death of plaintiff's intestate, alleged to have been caused by the negligence and wrongdoing of the Atchison, Topeka & Santa Fe R. R. Co.

On the thirty-first day of October, 1881, the deceased was a passenger on the defendant's road from Hutchinson, bound eastward to Atchison, to which latter place Philip Weber had paid railroad fare and held a ticket. It is held by the plaintiff that, after leaving Hutchinson and before the passenger train reached Newton, Philip

Weber became ill and was in a helpless and insensible condition; and that at 8 o'clock in the evening the employees of the defendant on the train "did thrust, force, push, and drag him" (the said Philip Weber) from their cars, and then carelessly and inhumanly left the said Philip Weber lying on the platform at Newton, aforesaid, in an exposed condition, and wholly unprotected from the cold and inclemency of the weather, and did then and there abandon him, and left him wholly unprotected and uncared for, for the space of two hours or more; and, as a result of such treatment and negligence of the defendant, said Philip Weber died on or about the first day of November, 1881.

The defendant denies any wrong-doing on its part; and alleges that when Philip Weber came upon the train at Hutchinson, Kansas, he was afflicted with *delirium tremens*, and was so violent and disgraceful in his conduct towards the other passengers of said train that said defendant, by its agents and employees, was compelled to remove, and did remove, him from its cars at the city of Newton, using no more force therefor than was absolutely necessary, and placed him in charge of the city authorities of the city of Newton for care and protection; and that said Philip Weber was not left lying upon the platform at Newton, in an exposed condition, for any longer time than was necessary to secure for him proper care and attention.

Trial was had at the June term, 1883, of the district court, and the following special findings of fact were returned:

SPECIAL QUESTIONS OF FACT SUBMITTED BY PLAINTIFF.

(1) What were the necessary funeral expenses incurred in burying Philip Weber? *Answer.* One hundred and eighty-two dollars and fifty cents.

SPECIAL QUESTIONS OF FACT SUBMITTED BY DEFENDANT.

(1) What was the age of Philip Weber at the time of his death? *Answer.* Thirty-six years.

(2) Did he leave wife or child; a father or mother? *A.* No.

(3) Did he leave as his next of kin his brothers, Conrad Weber, John Weber, Frederick Weber, Jacob Weber, and his sister, Margaret Gerloch? State age of each. *A.* Yes; but ages not known.

(4) Did Philip Weber contribute anything to the support of his next of kin? If so, to what ones, and when was it done, and to what did it consist? *A.* Mrs. Garlick and family, Mrs. Conrad Weber, and John Weber; date unknown; watch, clothing, and money, and holiday presents; inside of fifteen years.

(5) Are each of said next of kin able to support themselves, and are they in comfortable circumstances? *A.* In part, and in medium circumstances.

(6) Was said Philip Weber at the time of his death in poorer circumstances than any of his next of kin? A. Can't tell.

(7) Had said Philip Weber been in the habit of using all of his earnings in defraying his personal expenses? A. No.

(8) Did Philip Weber ever accumulate any property from his labor or in his business transactions? If so, state when he had such property, its value, and what it consisted of. A. Do not know.

(9) Was not all the property belonging to Philip Weber inherited by him a short time before his death? A. Yes.

(10) Was he not in very bad habits as to the drinking intoxicating liquors for years before his death? A. Yes.

(11) What personal or real property did Philip Weber leave, if any? What was the value of the same, and of what did it consist? A. Something over three hundred dollars; three hundred dollars and over; money and promissory note.

(12) Did any of his next of kin depend on him for support. A. No.

(13) Did Philip Weber take defendant's train as a passenger, at Durango, Colorado, on October 28 or 29, 1881, intending to go to Atchison, Kansas? A. Suppose he did.

(14) Did he get off said train at Hutchinson, Kansas? A. Yes.

(15) Why did he leave defendant's train at said station? A. Can't tell.

(16) Was he sick and suffering from the result of drinking intoxicating liquors to excess? A. Think he was.

(17) Was said Philip Weber placed in an east-bound train passenger-car of the defendant's at Hutchinson, Kansas, by the city officers of that place on the thirty-first day of October, 1881? A. Yes.

(18) Had he been in Hutchinson since the day before, suffering from the effects of excessive drinking? A. Think he was.

(19) Was he placed in said car by any of the agents or servants of the defendant? A. No.

(20) Was he capable, at the time he was placed in said car, of taking care of himself? A. With proper care.

(21) Could said Philip Weber sit in the seats provided for passengers in said car? A. Yes.

(22) Was he in a fit condition to travel on defendant's train without injuring him? A. Think not.

(23) Did said Philip Weber, immediately after being placed in a seat in said car, slip or fall therefrom into the aisle or passageway thereof, and ride lying in such place a part of the way going to Newton? A. Yes.

(24) What is the distance from Hutchinson to Newton? A. Thirty-three miles.

(25) What is the distance from Hutchinson to Atchison? A. Two hundred and eighteen miles.

(26) Did the agents or servants of the defendant know that said Philip Weber had been placed in said car, and the condition he was in, until after the train had started to leave Hutchinson? A. No.

(27) Was it necessary to remove Philip Weber from defendant's train at Newton? A. Do not know.

(28) Was he so removed by, and under the direction of, one of the police officers of the city of Newton? A. No.

(29) Did the city marshal of the city of Newton ascertain that said Philip Weber was at the defendant's station, and did said marshal take charge and control of him immediately after his removal from said car? A. After said Philip Weber had lain on the stone steps of the platform for over one hour in an unconscious state, then the city marshal took charge of said Philip Weber.

(30) Did the city marshal of Newton have charge of said Philip Weber from the time he was removed from said car until about two o'clock p.m. of November 1, 1881, when he was removed to the Howard House? A. After the expiration of one hour or over.

(31) Was Philip Weber kept in the city prison and engine-house from about 8:30 p.m. of October 31st until he was removed to the Howard House? A. From nine o'clock p.m. of October 31st he was.

(32) Were said places cold and unsuited for the occupancy of a person in his condition? A. Yes.

(33) Did not his confinement in said places have more to do with hastening his death than any other exposure he was subjected to? A. It might have had as much, but not more.

(34) Was said Philip Weber conscious at the time he was placed on the defendant's train at Hutchinson? A. He was.

(35) Was he in a fit mental condition to provide for his own safety on the train. A. At times he was.

(36) Shortly after leaving Hutchinson, and while said train was in full motion, did he not try to jump off of said train, and was he not prevented from so doing by one of the defendant's employees? A. We doubt it.

(37) Did he not endeavor to escape from the car in which he was placed three times, intending to jump therefrom while said train was in full motion, and was it not necessary for the train hands to watch him to prevent him so doing? A. No.

(38) Did the employees of the defendant watch and care for said Philip Weber while he was in said car, and prevent him from injuring himself by jumping off? A. No.

(39) Was not Philip Weber, at the time he was removed from the train at Newton, in such a condition as to render it unsafe for him to continue his journey to Atchison, Kansas, without medical treatment or any one to care for him? A. We think he was.

(40) Could not Philip Weber receive better care from the city authorities of the city of Newton than it was possible for the defendant's employees to give him on the train? A. Yes.

(41) Was he out of his proper state of mind and delirious while in said car; did he remove his shoes, complain that they were full of bugs and worms, and conduct himself in such a way as to annoy and frighten other passengers in said car? A. Yes.

(42) Did a number of passengers leave said car and go to other parts of the train because of his conduct? A. A few.

(43) Was his habit of so drinking increasing? A. Don't know.

(44) If said Philip Weber had lived, was it probable that his habits would have improved? A. Do not know.

(45) Was the sickness of Philip Weber just before his death caused by excessive drinking? A. Do not know.

(46) Did he have the *delirium tremens*? A. Had delirious tremors.

(47) Did he have a disease of that nature? A. Yes.

(48) Was his life of any pecuniary value to his next of kin at the time of his death? A. No.

(49) Were the habits of the deceased such at the time of his death that they would necessarily shorten his life, disable him from performing labor or transacting business, and make his expenses equal to earnings? A. Yes.

(50) Strictly, as a pecuniary question, as a mere matter of money, what was the loss of the next of kin of said Philip Weber by his death? A. No loss.

(51) State wherein the next of kin sustained any pecuniary loss by the death of Philip Weber, and in what did that loss consist? A. Sustained no loss.

(52) What is the probable amount that the deceased would have earned or made per year had he lived? A. When in health six hundred dollars.

(53) What would the expense of the deceased probably have been per year had he lived? A. Depends upon circumstances.

(54) How long would said Philip Weber probably have lived if he had recovered from his last sickness? A. Probably a natural life-time.

(55) If he had lived, how much more property or money would his next of kin have received from his accumulations than they did receive? A. Cannot tell.

(56) Of what other pecuniary value was the life of Philip Weber to his next of kin? A. No other pecuniary value.

(57) At the time of his death was he not in poor health and bad habits, caused by excessive drinking? A. In bad health; not necessarily caused by excessive drinking.

(60) What amount, if anything, do you find the plaintiff is entitled to recover as a pecuniary compensation to the next of kin for the loss of said Philip Weber? *A.* Four hundred dollars.

(64) Is it not a fact that Philip Weber was in such a condition, at the time he was removed from the train, that it was unsafe for him to continue his journey to Atchison, Kansas? *A.* Without proper care, he was.

(65) Is it not a fact that, when the conductor had Weber removed from the train at Newton, he placed him in charge of one of the policemen of said city, and told him to do everything he could for him, as he was in such condition that he could not take him on the train? *A.* No.

(66) Is it not a fact that Weber was turned over to the city marshal and overseer of the poor at Newton before the train left the depot in that place? *A.* He was not.

(67) Is it not a fact that the city marshal and overseer of the poor at Newton tried to get a place at the hotels and boarding-houses to take Weber, and failed on account of Weber's filthy condition? *A.* The lack of money was the cause, and not his filthy condition.

(68) Is it not a fact that the city marshal and overseer of the poor at Newton took Weber to the city jail only after having failed to get him into a hotel or boarding-house, and after having been directed so to do by the county physician? *A.* No.

(69) Did Weber contract any disease or sustain any injury during the time after he was taken from the car, and before he was placed under the charge of the city marshal; and if so, how much, and to what extent? *A.* Sustained an injury which resulted in his death.

(70) Was Weber's health in any manner injured, or his death in any manner hastened by, his accommodations and treatment after he was taken charge of by the city marshal and overseer of the poor? *A.* It was.

(71) Was not Weber's death caused by the *delirium tremens*? *A.* No.

(72) Was Weber's death caused or hastened by his exposure while in the city prison? *A.* In part.

(73) Was not Weber's death caused by the excessive use of intoxicating drinks, and his confinement in the city prison at Newton, Kansas? *A.* In part.

(75) Did not Weber have a sufficient estate to pay all funeral and burial expenses? *A.* Yea.

The general verdict of the jury was in favor of the plaintiff, and assessed the damages at \$400. The defendant moved the court for judgment in favor of the defendant, upon the special findings of the jury, notwithstanding the general verdict; which motion the court overruled, and ordered judgment for the sum of \$217.50,

which was the amount found by the jury, less the funeral expenses which were disallowed by the court. The defendant moved for a new trial upon the ground of excessive damages, appearing to have been given under the influence of passion and prejudice; that the findings and verdict of the jury are not sustained by the evidence; and for errors of law occurring at the trial. This motion was overruled. The defendant duly excepted to the ruling of the court, and brings error to this court.

*A. A. Hurd and Mills & Wells* for plaintiff in error.

*Everest & Waggener and Webb & Martin* for defendant in error.

**FACTS.** JOHNSTON, J.—The plaintiff, who is the personal representative and brother of Philip Weber, deceased, brought this action in the district court of Atchison county, in behalf of the next of kin, to recover the damages suffered by them in the death of Philip Weber, caused, as plaintiff alleges, by the wrongful act and neglect of the railroad company. The verdict and judgment were in favor of the plaintiff, and the defendant comes here assigning error on several exceptions that were taken during the trial.

It is first contended that the court erred in overruling the motion of defendant for judgment in its favor on the special findings returned by the jury. Upon the trial of the cause the defendant sought to show, among other things, that for several years prior to his death Philip Weber lived a reckless and dissipated life, and that, by reason of the excessive use of intoxicating liquors, and other causes, his condition at the time of the alleged injury was such that his survivors suffered no pecuniary loss in his death. The jury, in answer to special questions submitted to them, found, as will be seen, that none of his next of kin depended upon him for support; that his life was of no pecuniary value to them; and that they sustained no loss by his death.

**VALUE OF LIFE OF PERSON CONSIDERED.** The claim of counsel for the defendant is that, notwithstanding the death of Weber may have been caused by the wrongful act or omission of the railroad company, yet as there was no actual damage or pecuniary loss sustained by his next of kin, not even nominal damages can be recovered. In this we think counsel are mistaken. The deceased was entitled to his life, and presumably the next of kin had some interest in his existence. A right of action is expressly given by the statute in behalf of the next of kin, where the death of one is caused by the wrongful act or omission of another, provided the deceased, if he had lived, might have maintained an action for the injury caused by the same wrongful act or omission. The law infers an injury whenever a legal right has been violated; and every injury imports a damage. As a general rule, where the law gives an action for a wrongful act, the doing of the act itself



imports a damage, and even if no actual pecuniary damage may have been shown or suffered, still the legal implication of damage follows the wrongful act, and nominal damages, at least, may be recovered. Some of the English courts have held that if no actual loss is shown nominal damages are not recoverable; but the American courts, so far as our observation goes, uniformly hold, under statutes similar to our own, that, where a person has met with death caused by the wrongful act, neglect, or default of another, whenever there are next of kin, nominal damages, at least, may be recovered. *Lehman v. City of Brooklyn*, 29 Barb. 234; *Dickens v. R. R. Co.*, 1 Abb. Ct. App. 504; *Quin v. Moore*, 15 N. Y. 432; *Ihl v. Forty-second Street, etc., R. R. Co.*, 47 N. Y. 317; *Chicago & Alton R. R. Co. v. Shannon*, 43 Ill. 338; *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197; *City of Chicago v. Scholten*, 75 Ill. 468; *Thomp. Neg.* 1293.

The further point is made by counsel for the railroad company, that the findings and verdict of the jury are not sustained by the evidence. In response to special questions submitted by the court, the following findings of fact were returned by the jury:

"Was he so removed by and under the direction of one of the police-officers of the city of Newton? Answer. No. FINDINGS OF JURY CONTRARY TO EVIDENCE. DRUNKEN, DELIRIOUS PERSON MAY BE REMOVED FROM TRAIN. Did the city marshal of the city of Newton ascertain that said Philip Weber was at defendant's station, and did said marshal take charge and control of him immediately after his removal from said car? A. After said Philip Weber had lain on the stone steps of the platform for over one hour in an unconscious state, then the city marshal took charge of said Philip Weber. Did the city marshal of Newton have charge of said Philip Weber from the time he was removed from said car until about two o'clock P.M. of November 1, 1881, when he was removed to the Howard House? A. After the expiration of one hour or over. Is it not a fact that, when the conductor had Weber removed from the train at Newton, he placed him in charge of one of the policemen of said city, and told him to do everything he could for him, as he was in such condition that he could not take him on the train? A. No. Is it not a fact that Weber was turned over to the city marshal and overseer of the poor at Newton before the train left the depot in that place? A. He was not. Did Weber contract any disease or sustain any injury during the time after he was taken from the car and before he was placed under the charge of the city marshal; and if so, how much, and to what extent? A. Sustained an injury which resulted in his death."

In these findings the jury seem to have either mistaken or purposely disregarded the testimony upon the facts inquired about. The testimony is that upon the arrival of the train at Newton a special policeman of that city, who was doing duty at the station

of the railroad company, with the assistance of others, removed Weber, who was then in an unconscious state, from the train. The train remained at the station about 10 minutes. Within a few minutes after he was removed, and within 10 minutes after the arrival of the train, and before its departure, Weber was turned over to and placed in charge of the city marshal and overseer of the poor. Henry Meyer, who was the overseer of the poor, says that he took charge of him within from 8 to 10 minutes after the train came in, and immediately sent for a physician, and made effort to find a hotel or boarding-house where he could be received and cared for. This is, in effect, the testimony of several other witnesses who were there present; and in an examination of all the testimony in the record nothing is found contradicting it. Most of these findings are, therefore, untrue. Their materiality, when the issues and facts of the case are considered, will not be questioned. When Weber was placed upon the train at Hutchinson, his condition was unknown to the employees of the company in charge of the train. He had been in Hutchinson since the day before, suffering from the effects of the excessive use of intoxicating liquors. He was found by the officers of that city lying on one of the streets in a spasm, and, as they state, apparently afflicted with *delirium tremens*. Shortly after he was placed upon defendant's train at Hutchinson, he was seized with a fit, and fell from his seat upon the floor, where he struggled for some time. While going from Hutchinson to Newton, a distance of 33 miles, he had several such attacks. When he was out of these spasms, he appeared to be somewhat delirious, and the conductor states that he tried to jump off the train. In the car he removed his shoes, complaining that they were full of bugs and worms, and conducted himself in such a way as to annoy and frighten his fellow-passengers, so that a number of them left the car and went to other portions of the train. When the train reached Newton, he had fallen from his seat, and was lying in the aisle of the coach in an unconscious condition. It is clear that the conduct of the deceased justified the railroad company in removing him from its train.

It is the duty of a railway company carrying passengers to provide for their quiet and comfort, and secure them against the annoying and offensive conduct of other passengers; and where the conduct of a passenger is such as to render his presence dangerous to fellow-passengers, and such as will occasion them serious annoyance and discomfort, it is not only the right but the duty of a railroad company to exclude such passenger from its train. *Vinton v. Middlesex R. R. Co.*, 11 Allen, 304; *Com. v. Power*, 7 Mete., 596; *Jencks v. Coleman*, 2 Sum. 221; *Lemont v. Washington & G. R. R. Co.*, 1 Am. & Eng. R. R. Cas. 263; *Brown v. Memphis & C. R. R. Co.*, 5 Fed. Rep. 499; *Same v. Same*, 1 Am. & Eng. R. R. Cas. 247;

DUTY OF COMPANY TO PROTECT PASSENGERS FROM ANNOYANCE AND INSULT.

*Railroad Co. v. Statham*, 42 Miss. 607. And, under the authorities, it seems that it is equally the duty of the railroad company to remove from the train and leave an unattended passenger who, after entering upon a journey, becomes sick and unconscious or insane, until he is in a fit condition to resume his journey, or until he shall obtain the proper assistance to take care of him to the end of his journey. In this case considerations for the fellow-passengers, as well as for the health and comfort of Weber himself, required that the railroad company take him from the train.

In regard to Weber's condition with respect to completing his journey, the jury made the following findings:

"Was he in a fit condition to travel on defendant's train without injuring himself? Answer. I think not. Was not Philip Weber, at the time he was removed from the train at Newton, in such a condition as to render it unsafe for him to continue his journey to Atchison, Kansas, without medical treatment, or any one to care for him? A. We think he was. Could not Philip Weber receive better care from the city authorities of the city of Newton than it was possible for the defendant's employees to give him on the train? A. Yes."

Under these facts the propriety of his removal cannot be doubted. The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious and unable to take care of himself. They could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried the cause, "of course the carrier is not required to keep hospitals or nurses for sick or insane passengers; but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made."

The contention of the railroad company is that it performed its duty to this passenger when, after taking him from the train, it turned him over to the authorities of a city having 4000 inhabitants, and well supplied with public-houses, and especially when it placed him in charge of the overseer of the poor. The statute makes it the duty of an overseer of the poor of any township or city to grant temporary relief to any non-resident who may be found lying sick therein, or in distress, and without friends or money; and the expense of providing such relief is to be paid out of the county treasury. *Commissioners of Pottawatomie Co. v. Morrall*, 19 Kan. 141. This was the condition of Weber; he was in distress, sick, and without friends or money. It became the duty of the overseer, when his attention was properly called to Weber's condition, to take charge

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of him and make provision for his temporary relief. We think that if the railway company carefully and prudently removed him from the train and promptly placed him in the care of the overseer of the poor, who received and took charge of him, under the facts of this case, it has exercised that reasonable care and diligence in making provisions for him that the law requires. And here the materiality of the findings in question arises. The jury found that he lay on the platform of the company's depot in an exposed condition for over an hour before he was taken charge of by the overseer of the poor, and that during that time he sustained such injuries as resulted in his death. While, as we have seen, the testimony is that he was placed in charge of the overseer within a few minutes after he was removed from the train, we do not assume to decide whether or no Weber sustained any injury from exposure during the brief time that elapsed after he was removed from the train and before he was taken in charge by the city authorities, nor whether the railroad company during that time exercised due care towards him and due diligence in providing for his safety and comfort. But as it appears that these important findings, upon which the general verdict of the jury may have been mainly founded, are untrue, and inasmuch as the jury allowed more than nominal damages, notwithstanding a special finding that the next of kin sustained no pecuniary loss by the death of plaintiff's intestate, the verdict cannot be permitted to stand. There are other assignments of error; but, in view of the conclusion that has been reached, we do not deem it necessary to notice them.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

**Expulsion of Intoxicated Passengers.**—The right of a railroad company to put off an intoxicated, boisterous, or disorderly person from their train is not doubted. But it is also well settled that such ejection must be done in a reasonable manner, at a proper time and place, and, considering his condition, without exposing him to harm or imperilling his life.

A conductor upon the defendant's train removed therefrom the plaintiff's intestate, who had failed to produce a ticket when required, and who had no money wherewith to pay his fare. There was evidence tending to show that the intestate had bought and lost his ticket, and before he was expelled one of his companions tendered the fare to the conductor, who refused to receive it, demanding a ticket. The intestate, who was very much intoxicated, was put off the train in a cut twenty feet deep. He proceeded in the direction of his home some one thousand seven hundred feet, where he laid or fell down, and was run over and killed about fifteen minutes later, by the train of another company which had the right to run its cars over the defendant's road. *Held*, that, as the intestate was wrongfully removed from the train, the question as to whether his death was or was not directly traceable to such removal should have been left to the jury, and that the court erred in nonsuiting the plaintiff. *Guy v. New York, etc., R. R. Co.*, 30 Hun (N. Y.), 399.

So, where plaintiff, being intoxicated, was removed from defendant's train, on account of a refusal to pay his fare, and owing to the severity of the

weather and his helpless condition, his limbs were frozen, causing intense suffering and confinement for several months, *held*, that the railroad company was negligent. Louisville, etc., R. R. Co. v. Sullivan, 81 Ky. 624; s. c., 16 Am. & Eng. R. R. Cas. 390.

But in the following cases the injury was too remote to entitle the plaintiff to recover. Plaintiff's intestate was ejected by the defendant's conductor from a train of cars, and left in the night time, in a state of intoxication, near the track; several hours after, at a distance of half a mile from the station where he was ejected, he was killed by another train of cars. *Held*, that to entitle the plaintiff to recover, it should have been made to appear, to the satisfaction of the jury, that the killing was the natural or proximate result of the act of defendant's agent. Healy v. Chicago & N. W. R. R. Co., 21 Ia., 15.

If having exercised reasonable prudence, considering the time, place, and circumstances, as also the condition of the drunken man himself, the conductor expels an intoxicated passenger, who is afterwards run over and killed by another train not in fault, the expulsion itself is not such a proximate cause of the death as will make the company liable. R. R. Co. v. Valley, 82 Ohio St. 345.

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### LONG ISLAND R. R. Co.

v.

WERLE, Adm'r.

(98 New York Reports, 650.)

The stoppage of a railroad train at a regular station is an invitation to the public to take passage thereon, and the sale of tickets for that train binds the company running the road to furnish its passengers a safe and secure place to ride.

Proof of their omission to do so, whereby a passenger is obliged to ride in an unsafe place, is evidence tending to show negligence.

The fact that a passenger, failing to find a seat, and having none pointed out to him by any employee of the company, takes a position on the platform of the car where other passengers are riding, and without objection from any employee, and is thrown from the car by a sudden lurch given it by the great and increased speed with which the train is run when turning a curve, does not, as matter of law, establish contributory negligence.

THIS was an action to recover damages for alleged negligence, causing the death of Jacob P. Werle, plaintiff's intestate.

The deceased took passage on a train on defendant's road at East New York for Manhattan Beach. The cars were crowded, and failing to find a seat, he, with others, stood on a platform of a car. Other passengers were standing between the seats and on other platforms. The train, on turning a curve, ran at great and increased speed. The car, in consequence, gave a sudden lurch, and the deceased was thrown from the platform and killed.

*Alfred C. Chapin* for appellant.

*William A. Cohen* for respondent.

THE COURT—The stoppage of the train at East New York, one of its regular stations, constituted an invitation to the public to take passage thereon. The sale of tickets by the defendant at that station for passage on that train bound it to furnish a safe and secure place for its passengers to ride, and comfortable accommodations for their convenience. Proof of its omission to do so, whereby the plaintiff's intestate was

STOPPAGE OF  
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TION TO ENTER.

obliged to ride in an unsafe place on the platform of the car, and the speed with which they ran over the curves when the accident occurred, furnished sufficient evidence from which the jury were authorized to find the fact of defendant's negligence. This is not questioned by the appellant, but he contends that the evidence shows contributory negligence on the part of the plaintiff's intestate.

There was evidence tending to show that the deceased got onto the train at a way station, that he looked for seats before getting on, and could find none, and then took up a position with his companion and others on the platform of a car. Other passengers were also riding upon the platforms of other cars, and many were standing up inside the cars between the seats. No servant of the defendant pointed out any seat for him to occupy or objected to the position which he had taken on the car. The evidence tended to show that the accident occurred in consequence of a sudden lurch given to the car by the great and increased speed with which it struck and turned the curve. This motion of the car was described by some of the witnesses as of considerable violence, and one of them stated that he would have been thrown to the floor if he had not caught and been sustained with both hands by the seats. One witness testified that the motion of the car sent the deceased flying through the air, and another that it threw him off up into the air.

This evidence tended to show an unusual and dangerous movement of the cars, and bore strongly upon the question of contributory negligence.

The evidence was conflicting as to whether the deceased was standing near the centre or on the edge of the platform at the time of the accident, and it was silent as to whether he was holding to anything at that time.

While the evidence as to many of the facts was conflicting, we think there was nothing proved in the case for which the court have the right, as a question of law, to attribute contributory negligence to the deceased, and that the whole case presented simply questions of fact for the consideration of the jury. *Ginna v. Second Av. R. R. Co.*, 67 N. Y. 596. Under such circumstances we have no right to disturb their verdict, and the judgment should be affirmed.

See *Camden, etc., R. R. Co. v. Hoosey*, 6 Am. & Eng. R. R. Cas. 460.

## GULF, HOUSTON AND SAN ANTONIO R. R. Co.

v.

DAVIDSON.

(61 *Texas Reports*, 204.)

In a suit against a railway company by a passenger for damages for injuries inflicted by the alleged negligence of the company's servant in closing a car-door on plaintiff's finger and crushing it, one of the controverted facts in the case was whether the plaintiff, when the injury was received, was attempting to enter one of the carriages of the train, or whether he was standing on the car platform with his hand negligently so placed as to be rendered liable to injury. *Held*, that a charge which in its language seemed to assume as a fact that the plaintiff's finger was crushed when attempting to enter the car was error.

The error was not remedied by another charge, to the effect that unless the jury believed that the porter (the servant) knew that plaintiff's finger was in such a position as that it would get crushed when he shut the door, and when the injury was inflicted, they could not find for the plaintiff.

In this case it was error to give a charge which in effect asserted that it was negligence for a porter on a railway train to close the doors of the company's cars without giving warning of his intention to do so in advance.

APPEAL from Colorado. Tried below before the Hon. Everett Lewis.

Appellee sued for damages for personal injuries alleged to have been caused by the negligence of the porter of a passenger car of defendant, whereon plaintiff was a passenger, in closing the door of the car upon the middle finger of his left hand, whereby the same was crushed. The defendant answered by a general denial.

Verdict and judgment for plaintiff for \$2000. The judgment was reversed on account of a charge held to be erroneous, which will be found in the opinion.

*E. P. Hill* for appellant.

*Kennon & Townsend* for appellees.

WEST, J.—We are of opinion that the court committed an error, and one prejudicial to the rights of the appellant, in giving charge No. 1 at the instance of appellee.

The instruction was as follows: "1. If the jury find, from the evidence, that the plaintiff was lawfully upon defendant's train as a passenger, and that in attempting to enter one of the carriages of said train the porter upon said train forcibly closed the door of the car upon the finger of plaintiff, whereby it was injured, and that said door was closed without any warning, and that the plaintiff was not guilty of contributory negligence, then the plaintiff would be entitled to recover the actual damages proven,"

FACTS.

including compensation for physical and mental suffering resulting from the injury and his loss of capacity to earn money since the infliction of the injury and in the future."

The charge was not free from objection in that it practically assumed, or seems to assume, as a fact one of the issues raised in the case. To that extent it was nearly equivalent to a charge on the weight of evidence in effect. Whether or not the appellee was in the act of entering the smoking-car, or attempting to enter it, when he was injured, was one of the disputed questions in the case, and one which we regard, under the facts disclosed, as of considerable importance. Where the appellee was when the injury was inflicted, and what he was doing at the time, were matters calculated to throw a good deal of light on the case. The record, too, shows that both parties regarded this subject as of some importance, the one endeavoring to show that he had in fact been on appellant's train only a very short while before being injured, and had been during all that time endeavoring from the first to make his way through the first-class car, which was crowded, to the door of the smoking-car, for the purpose of obtaining a seat there. On the contrary, the appellant was endeavoring to show by evidence that the appellee was not at the time the injury was received attempting to enter the smoking-car, but, on the contrary, that since he had entered the train it had travelled at least two miles, and that the day was so far spent that the porter was just getting ready to light the lamps in the ladies' car; and that the appellee, so far from being in the act of entering, or attempting to enter, the smoking-car, that being then only a mile from his place of destination, was standing on the platform of the smoking-car engaged smoking a cigar, with his hand placed by him negligently and carelessly in such a position that it must necessarily be injured when the car-door was closed. The evidence of the appellant himself was to the effect that he was engaged in smoking a cigar when the injury was received. The porter also swore that the appellant was on the platform, in the act of lighting a cigar, when he was hurt.

Under the particular circumstances of this case the court erred in giving the instruction now under consideration.

The appellee, in his brief on this point, seems to concede, at least partially, that the charge in question was liable to some criticism. He urges, however, that it was cured by the action of the court in giving the jury, at the request of appellant, a charge to the effect that "unless the jury believe that the porter of the car knew that plaintiff's finger was in such a position as that it would get mashed when he shut the door, and when the injury was inflicted, they cannot find for the plaintiff."

This view of the matter is certainly not without force, but we are of the opinion that the error in this instance was too serious to be thus remedied.



The instruction under consideration was also objectionable for another reason. It asserts, in effect, that it is negligence on the part of appellant for its porter to close the doors of appellant's cars without giving warning of the fact in advance. Unless there is some special reason for giving notice or warning, we are aware of no principle of law that in such cases requires it to be done. It is sufficient, generally, if the door of the car is opened and shut with usual and proper care, in the ordinary way, without any public warning or parade or ado over the matter. No warning to the passengers is necessary, unless there may exist some special reason for giving notice. It was certain that the porter on this occasion had given no warning in the sense in which the jury understood the term, and this portion of the charge was wrong and well calculated to prejudice the rights of the appellant and mislead the jury.

CLOSING DOOR  
WITHOUT WARN-  
ING IS NOT NEGLIGENCE.

Further, the phrase used in the charge, "forcibly closed the door," was calculated to confuse the jury. The appellee contends that this word *forcibly* means, in this connection, *knowingly*. We do not think so, and are of the opinion that the instruction, under the facts of this case, taken as a whole, was quite objectionable.

The instruction we have been considering seems to have been copied in substance from Mr. Underhill's commentary in his work on Torts, p. 274, on the case of *Fordham v. T. B. & S. C. R. R. Co.*, Law Rep., vol. 4, C. P., p. 619; 32 Vict. 1868, 1869.

The court and counsel at the trial evidently did not have that case before them. It differed in many of its features from the one in hand. It seems, from the facts of that case, that the door of the railway-carriage, where the injury was received, was on the side, or, at least, if not on the side, constructed differently from the doors to cars in this country.

It also appears in that case that the injury was received on a dark night; that near the door there was not, as it seems there should have been, a handle near the side of the door, attached to the car, to aid passengers in getting on the cars. It also appears that the passenger, finding, in the dark, no handle to hold to, was forced to put his left hand on the back of the door to aid him in getting up, having at the same time a bundle or parcel in his right hand. Before he had completely entered the carriage, and when he could be plainly seen by the railway-guard, without giving him any previous warning, the guard forcibly closed the door and crushed his hand between the back of the door and the doorpost. It would seem that the door was possibly a sliding-door, and did not open and shut on hinges as the doors do on appellant's carriages. The court held in that case that inasmuch as the passenger had been invited to enter the car, the door having been opened for that purpose, he had a right to do so; that the failure, or apparent failure, to have a handle near the door for the use of the passengers in getting on

the train was negligence on the part of the railroad company. Further, that in the absence of such handle, and in consideration of the darkness, the passenger could not be said to be guilty of negligence, under the circumstances, in having his hand where it was at the time of the injury. The case itself has been carefully examined. It is also cited and commented on in *Thompson on Carriers of Passengers*. See, also, *Richardson v. Met. R. R. Co.*, *Law Rep.*, 3 Com. Pl. p. 374.

The facts vary materially, in several respects, from the case under consideration; and a charge as to the forcible closing of the door without warning that might be applicable in one case would not apply to another where a different state of facts existed.

In view of this error of the court the appellant cannot be said to have had a fair trial. Without intimating any opinion as to the nature of the case as disclosed by the evidence, we may venture to make an observation or two with a view to aid in a final disposition of the case on the next trial in a more satisfactory manner.

Mr. Thompson, in his work on *Carriers of Passengers*, p. 264, lays the rule down on this subject as follows: "A passenger cannot be said to be in the exercise of due care who voluntarily and unnecessarily places his hand upon the framework of the door of the carriage so that when the door is closed it must be inevitably crushed."

The case of the *Metropolitan R. R. Co. v. Jackson*, 3 App. Cas. 193, also cited by Mr. Thompson in the above-named work on the same page (264), may be profitably examined in this connection.

For the error above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

**A Passenger negligently injured by or about a Car-door may recover therefor. Contributory Negligence.**—*Western Maryland R. R. Co. v. Stanley*, 61 Md. 266; 48 Am. Rep. 96, presents the instance of a passenger who, while the train was passing through a tunnel, and the door being open, great volumes of smoke and cinders rushed into the car, got up to shut the door. While groping in the dark with outstretched hand to find it, it was forcibly pushed or blown back, striking his hand with such force that it passed through the pane of glass in the door and was severely cut and injured. There were no lights in the train, although the company knew it must pass through the tunnel, and there were but two conductors and two brakemen on the train, although it was very heavy—being composed of 10 passenger cars. It was held that the company was negligent, and that plaintiff was guilty of no contributory negligence in shutting the door, although he knew there were persons about the door inside and out. "If that were so," said the court, "it cannot affect the question; for there were no seats for those persons, and it was the duty of the company to have seen that the doorway was not so obstructed by the crowd as to keep it open and inflict this discomfort (smoke) on passengers, and prevent the doors from being shut." Of the smoke the court said: "He received its full force and volume, as it came rushing in, before it diffused itself over the car. It choked him. Self-preservation prompted him to shut it out. It cannot be that a man under such

circumstances, feeling himself suffocating or choking from the smoke, cinders, and gas, must sit supinely and endure, without making any effort to relieve present and prevent further physical pain."

Similar views were expressed in *Gee v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 161, 5 Eng. Rep. 169, by Chief Justice Cockburn: "If the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience." In that case the action was against the railway company for negligence. The passenger was accustomed to the line, and was explaining to his brother, a fellow-passenger, the working of the signals along the line. He remarked to his brother: "If you look out when I tell you, you will see the lights for Sloane Square," at the same time standing up himself and taking hold of the small brass bar across the window of the off-side door (it is to be remembered that English railway carriages have side-doors) of the carriage. The plaintiff intended to look out, but as he leaned against the door it blew open and he fell out and was injured. The company was held liable. *Gee v. Metropolitan Ry. Co.*, *supra*.

*Adams v. Lancashire, etc., Ry. Co.*, L. R. 4 C. P. 739, presents a somewhat similar case, in which a different result was reached. There the door (at the side) of a carriage in which plaintiff was a passenger, on the defendant's railway, flew open several times, owing to the negligence of the company. There was room in the carriage to sit away from the door, and the train would have stopped at a station in three minutes. Plaintiff shut the door three times, and fell out while making a fourth attempt to do so. The train stopped at three stations between the time of first opening the door and the accident. It was decided that as the inconvenience plaintiff would have suffered if he had not shut the door was slight, and the peril incurred in shutting it was considerable, the injury he suffered was not attributable solely to the company's negligence, and they were not liable therefor.

*Fordham v. London, etc., Ry. Co.*, L. R. 4 C. P. 619, presents the case of a passenger who, in getting into a railway-carriage at a station, placed his left hand on the back of the open door to aid him in mounting the step. There was a conflict of evidence as to whether there was a proper handle affixed to the carriage to the right hand of the door; but the night was dark, plaintiff did not see any handle, and had a parcel in his right hand. Before he had completely entered the carriage, the guard, without previous warning, closed the door, and crushed his hand between the back of the door and the door-post. It was held that there was negligence by the railway company, and none by the passenger, who therefore recovered a verdict. *Fordham v. London, etc., Ry. Co.*, *supra*; s. c., L. R. 3 C. P. 370.

This case was unsuccessfully relied upon in *Richardson v. Metropolitan Ry. Co.*, which was tried before the Recorder, in the Mayor's Court, London, 26th May, 1867. The facts were these: Plaintiff got into a third-class carriage at King's Cross, placing his hand on the front edge of the door. When in, but before he could find a seat (the carriage being already full), a porter closed the door upon plaintiff's thumb, injuring it severely. There was no evidence as to the state of the light, nor did it appear whether or not there was a handle by the side of the door. It was proved that before closing the door the porter called out: "Take your seats. Take your seats;" and plaintiff admitted that he had his hand on the door for half a minute after he entered the carriage. The jury found that the company was negligent, and that the passenger was not negligent. The Recorder thought the verdict wrong on both points. The court made a rule absolute nonsuiting plaintiff, holding the case distinguishable from the *Fordham* case on the ground that the porter had merely closed the door in the ordinary and proper exercise of his duty after due warning; and that the accident was solely attributable to

the plaintiff's own want of caution in leaving his hand after he had entered the carriage upon a door which he must have known would be shut immediately. *Richardson v. Metropolitan Ry. Co.*, L. R. 3 C. P. 374, note. *Maddox v. London, etc., Ry. Co.*, 38 L. T. N. S. 458, presents almost the same state of facts, and is similarly decided to the last case. Plaintiff was a passenger on the defendant's railway with his son. On arrival of the train, the son entered the carriage first, followed by the father. After plaintiff had completely entered the carriage, but before he had taken his seat or passed the passenger sitting next the door, a servant of the company shut the door without warning, closing it upon plaintiff's thumb, which was injured. The verdict was for £20 damages, but the court thought there was no evidence of negligence to go to the jury. "The plaintiff's thumb," said Grove, J. "was by some means in the hinge of the door, and was injured. How it got into that position we do not know, or why it was behind him, as it must have been more or less. But it was plain that it was not by the negligence of the guard who shut the carriage."

## NEW YORK, LAKE ERIE AND WESTERN R. R. Co.

v.

HARING.

(47 *New Jersey Law Reports*, 137.)

A railroad corporation cannot defend itself, in an action for a tort done by it on the ground that the business in the prosecution of which the tort was done was *ultra vires*.

The plaintiff was injured by the mismanagement of a street horse-car. The defendant contended that even if the jury found that it ran such horse-cars, that, as it had no franchise so to do, it could not be liable to the action. *Held*, such defence was untenable.

An agent of the railroad company ejected, with unnecessary violence, a passenger from the cars. *Held*, the company was liable for the hurts to the passenger done in the course of such ejection.

ON error to the Supreme Court.

This case was tried at the September term, 1884, of the Hudson Circuit Court, before Mr. Justice Knapp and a jury, and a verdict rendered for the plaintiff below, Haring, for the sum of \$1000, and judgment being entered thereon, a writ of error was brought to this court.

*Cortlandt & R. W. Parker* for plaintiff in error.

*R. B. Seymour* for defendant in error.

BEASLEY, C. J.—The injury for which this suit was brought  
FACTS. was an alleged unauthorized ejection from a horse railroad-car that was running at the time on the road of a corporation known as the Pavonia Horse Railroad. There was evidence tending to show that, at the time in question, the plaintiff in error was using this road and running the cars over it in charge of its own

agents, and was receiving the profits arising from the business; and it was properly left to the jury to find whether such usufruct of such road existed. Nevertheless, the counsel of the defendant below insisted and asked the judge to charge the jury to find against the action, even though they should be of opinion that his client was thus engaged in the specified business. The ground assigned was that the plaintiff in error could not legally undertake the employment in question, not having been vested with the requisite franchise, and that consequently it was not, in its corporate capacity, liable for any of the consequences of such employment.

But the doctrine of *ultra vires* does not apply to torts of this nature. It would indeed be an anomalous result in legal science if a corporation should be permitted to set up that inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defence. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are, in a sense, *ultra vires*; and if the want of a franchise to do the tortious act be a defence, then corporations have a dispensation from liability for these acts peculiar to themselves.

There does not appear to have been much discussion of this subject, but a case decided by the Supreme Court of Tennessee is directly on the point. The precedent referred to is reported in 53 Tenn., p. 634, and is entitled *Hutchinson v. Western & Atlantic R. R. Co.* It was an action against a corporation for damages occasioned by the negligence of its employees. It appeared that the railroad company was, without authority, running a line of steamers, and the plaintiff had been hurt by the mismanagement of one of them. The defence of *ultra vires* was interposed in that case, as in the present, but it was rejected on the ground that such doctrine had no application to torts of that character.

This exception cannot prevail.

The second ground urged for a reversal of this judgment was the exclusion of the defendant's offer to make proof of what an absent witness had testified to at a previous trial of this cause. The right to put in this secondary evidence was claimed for the reason that the witness in question was out of the State and, although requested, had refused to attend the trial.

This offer was, in my opinion, properly rejected. Mere absence from the jurisdiction, coupled with a refusal to attend as a witness, has never, in the practice of our courts, been held to authorize the introduction of the testimony of the witness previously taken. If

ULTRA VIRES  
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MONY.

it had been shown that this witness had left the State, and, upon diligent inquiry, his whereabouts could not be discovered, then a ground would have been laid for the course proffered. The substitution of the former testimony for the re-examination obtains only from the practical necessity of the occasion. But no such necessity exists when the residence of the witness is known and he is in the United States, and his testimony can be taken by a commission.

From the examination of this subject in the case of *Berney v. Mitchell*, 5 Vroom, 337, it is manifest that the practice in the different States in this particular is not uniform, but, as has been already stated, the rule must be considered settled in this State by inveterate usage.

So, I think, no fault can be found with the charge of the judge in that part of it which defined the extent to which the railroad company was liable for the act of its agent in the expulsion of the plaintiff. It was, in substance, that if the driver of the horse-car, being the agent of the railroad company, and having the right to expel the plaintiff on account of his intention to ride without paying his fare, transacted the expulsion so rudely and violently as to cause the injury complained of, "then," the judge said, "I think you may say that it is a part of the act of removal, and the driver, or the company whose agent he was, would be liable." This instruction plainly limited the responsibility of the railroad company to the results of the acts of its agent in its business.

The judgment is affirmed.

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GRUBER

v.

WASHINGTON AND JAMESVILLE R. R. Co.

(*Advance Case, North Carolina. 1885.*)

Where the case on appeal, made out by the presiding judge, uses the words "bond fixed at \$25, bond given," it was held a waiver of the statutory requirement that the surety to the undertaking on appeal must justify.

Where the approval of an unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present, or afterwards assents.

Where the owners of a steamboat provided a pass-way which was exposed to escaping steam, and a passenger was injured in consequence by the escaping steam; *held*, that the owners were liable.

It seems that where, by its charter, a corporation was empowered to cut and manufacture lumber, and to ship the same to market, it can, in providing means of transportation for its own products, as incidental to its own business, carry the goods of others, and passengers.

It is no defence to an action of tort that the tort complained of resulted from an act which was *ultra vires*. So, where a corporation undertook to carry passengers, one of whom was injured by the negligence of the corporation, it was immaterial to inquire, in an action for damages, on account of such negligence, whether the corporation had the power, under its charter, to carry passengers or not.

CIVIL action tried at Spring Term, 1883, of Martin Superior Court, before SHEPHERD, J.

The appellant, a corporation formed under an act of the General Assembly, for the purpose of cutting and forwarding to market timber growing upon lands in certain specified counties, and with authority to construct and operate a railroad through said lands between the towns of Washington and Jamesville, on the Roanoke River, in furtherance of the objects of its organization, had employed steamers to run, as common carriers of persons and freight, between its last-named terminus and the town of Elizabeth City, touching at Edenton on their way. In October, 1881, the plaintiff, an infant of tender years, with her parents, and under their care, took passage from Elizabeth City to Edenton on the Juniata, one of the two steamers constituting the line. The boat arrived at Edenton, and when the gangway plank to the wharf was announced clear for passengers to go out, the plaintiff, passing along the way to the wharf, was struck by a jet of steam, or hot water, issuing with great force from the condenser in the engine-room, through an unclosed door, and, falling upon the gangway, where the plaintiff and others were, from which she was scalded and badly injured. The action is to recover damages in compensation therefor.

Several issues were submitted to the jury, which, omitting needless verbiage, with the responses, so far as they pertain to the appellant's liability, were as follows:

I. Was appellant, the railroad company, the proprietor of the steamer on which the injury occurred, and was she engaged in conveying passengers and freight between Jamesville and Elizabeth City? Answer—Yes.

II. Did the appellant receive the plaintiff as a passenger on said boat at Elizabeth City for conveying to Edenton? Answer—Yes.

III. Did the said company so negligently and unskilfully conduct themselves in the management of said boat as to injure the person of the plaintiff by the escaping steam or water? Answer—Yes.

IV. Did the plaintiff contribute to the injury sustained thereby? Answer—No.

The answer to the other issue was but in an assessment of damages.

The only exceptions, shown by the record to have been taken, were to the refusal of the court to give these instructions:

I. If, as the evidence discloses, the injury was caused by defective machinery, and not by the negligence of the agents and officers of the company, the plaintiff was not entitled to recover, and that,

II. Taking the facts to be as testified to by the witnesses, the company had incurred no liability to the plaintiff.

There was judgment for the plaintiff, and the defendant appealed.

The defendant moved in the Supreme Court to dismiss the appeal, on the ground that the undertaking was defective.

*George H. Brown, Jr.*, for the plaintiff.

*James E. Moore* for the defendant.

SMITH, C. J.—The motion to dismiss the appeal for want of a justification of the sufficiency of the sureties to the undertaking filed must be denied.

The case settled by the presiding judge, with consent of parties, on September 14, 1883, and bearing his signature, contains these words:

Judgment—appeal by railroad company—bond fixed at twenty-five dollars—*bond given*—notice waived—by consent defendant given 30 days to serve statement of case.

The undertaking had been executed early in July preceding, and consequently has been accepted in its present form. We interpret the language of the judge as importing that the undertaking was proposed to be entered into with the named sureties in court, and no objection to their sufficiency then made.

The subsequent execution of the instrument in accordance with the appellant's offer, and the acquiescence of the appellee therein, must be deemed a waiver of the statutory requirements in this regard.

In *Hancock v. Bramlett*, 85 N. C. 393, the case made out by the judge contained words essentially the same, "filed and approved," and were held to indicate a tender and acceptance in open court, to which the appellee, having then made no objection, could not be heard to make it in this court.

To the same effect is *Harshaw v. McDowell*, 89 N. C. 181.

The ruling, in *McMillan v. Nye*, 90 N. C. 11, is not repugnant to these cases, since the filing and approving is there the act of the clerk, and appears in his certificate, it not being shown that the appellee was present or ever assented.

It is to be observed that the instructions asked were entirely inappropriate in the form of directions to the jury, for they were not pertinent to a single inquiry before them. The jury were to find the facts in response to the several issues, and not the law arising upon the findings. It was the province of the court to determine, when the facts were thus ascertained, whether the com-



pany was responsible for the wrong done, or, in other words, whether the plaintiff was entitled to judgment for the damages she had sustained.

But assuming the intent of the prayer to have been to present to the court the alleged repugnancy of the proofs to the averments in the complaint, as to the manner in which the injury was inflicted, the refusal of the court was entirely correct.

If the machinery was defective and unsafe, it is not less true that there was that want of watchfulness and care on the part of the employees by which the injury might have been avoided. The steam was seen previously to have is- ESCAPE OF STEAM  
NEGLECTANCE. sued; a passway out was provided which was exposed to it, and the door was left open, through which it was permitted to pass and smite those who were there passing. If this be so, there was great culpability on the part of the employees, and the damage directly resulted from their carelessness and inattention in not providing against it.

The second instruction points to no specifically assigned error, and to give it any significance we must suppose it was pre- ULTRA VIRES AS  
A DEFENCE TO A  
TORT. dicated upon the proposition that the company's undertaking the business of common carriers by water is outside the scope of its corporate powers—*ultra vires*—so that in that capacity it would not render itself liable to persons or to property conveyed in its steamers.

It is somewhat questionable whether there has been in this respect such a departure from the purpose of the organization, as to make the establishment of the line of water communication as a further means of reaching a market, an exercise of power not within the operation of the principle intended to be expressed in those words.

By the words of the charter the company was authorized "to cut and manufacture lumber and *ship the same to market*" (Acts 1868-'9, chapter 37), and in providing this means of transportation for its own forest productions to a market it may, perhaps as incidental to its own business, carry the goods of others, and passengers.

In *South Wales Ry. Co. v. Redmond*, 10 C. B. (N. S.), 675, a contract made by a company whose railway terminated at Milford Haven, with another for steam-vessels to run from that point to Ireland, was held not to be *ultra vires*, and that the defendant having provided an unseaworthy vessel was liable in damages, Erle, C. J., remarking, "so far from a contract by this company to facilitate the forwarding of passengers and goods to Ireland being illegal, I rather gather that the legislature contemplated and intended that a railway terminating at Milford Haven should forward traffic to and from Ireland, and therefore this contract would be entirely within the scope and object of the company's incorporation and extension."

But if it is conceded that the line of steamers was not within the contemplation of the charter and was unwarranted by it, it by no means follows that upon the wrongful assumption of the business of common carriers, it can be conducted without incurring the obligations for safe transportation which belong to the exercise of those functions. It can be no defence to the company which undertakes to receive and carry persons for hire, that they had no legal right so to do, when charged with responsibility for wrongs coming to those who commit their personal safety to the agents of their company, and who suffer from their negligence and misconduct.

"Herein," remarks a late writer, "consists a great distinction between *tortious* and *contractual liability* for acts *ultra vires*. It is no defence to legal proceedings in tort, that the torts were *ultra vires*. If the torts have been done by the corporation, or by their direction, they are liable for the result, however much in excess of their powers such torts may be." Green's Brice's *Ultra Vires*, 265.

In *Merchants' Bank v. State Bank*, 10 Wall 604 (645), the court say: "Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application."

"A corporation will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be." Green's Brice's *Ultra Vires*, 241, note; *Railroad Co. v. Schuler*, 34 N. Y. 30.

It is needless to pursue the subject further. The instruction was properly withheld and the proposition not acted on.

There is no error and the judgment is affirmed.

No error. Affirmed.

**Limitations of Liability of Railway Corporations for Torts.**—While in a broad, general sense it may be true that "corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application," *National Bank v. Graham*, 100 U. S. 699, 702; *Merchants' Bank v. State Bank*, 10 Wall. 604, 645; yet there appear to be some exceptions and limitations to the rule that are worthy of note. At least there are cases which so intimate."

"To fix the liability of a corporation for the tortious act of one of its employees, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. If the directors should order an agent to take a person out of his house and beat him, the corporation could not be held for the assault and battery; or if the directors of a banking company should purchase a steamboat and engage in transporting passengers, the corporation would not be liable for the misfeasance or nonfeasance of agents employed in that business. But if directors of a corporation having power to hold lands, order an agent to enter on lands and take possession of them for the legitimate uses of the company, his entry, if unlawful, will be the trespass of the corporation." *Brokaw v. N. J. R. R. Co.*, 32 N. J. L. 328, 332.

Mr. Taylor, discussing this subject in his work on corporations, § 338, says: "Granted that a corporation is liable to the same extent as a natural person for the torts of its agents. Nevertheless, it is not liable for any tort they may commit, however foreign to the nature of the corporate business the tort may be (citing *Langan v. Iowa, etc., Construction Co.*, 49 Iowa, 317). But, say the court, a corporation can act only through agents. Truly; and the binding quality of the acts of the body corporate, itself acting as such, i.e., through a majority vote, is determined by a construction of its powers and the principles of agency. Assuredly there exists no universal agency in the corporation which will render any act of the majority binding. Accordingly, to hold the corporation liable for any wrong it might authorize would be to hold the corporate funds, in which are interested dissenting shareholders and innocent creditors, bound by the acts of an agent (i.e., the majority) clearly beyond the scope of his authority and business; a liability far beyond that attaching to individuals for the acts of their agents. There is no *decision* known to the writer holding a corporation liable for a tort committed in the course of an *ultra vires* transaction on its face foreign to the corporate business, where the persons who could have objected to the transaction had not acquiesced in it. (Note: There seems to be no reason to suppose, however, that all the persons implicated in the commission of the tort would not be personally liable to the injured person.)

"As before stated, the question is not whether the wrongful act itself was *ultra vires*, any more than the question would be whether that act itself had been authorized by the corporation (see *Butler v. Watkins*, 13 Wall. 456). The question is whether the employment on general transaction in the course of which the tort was committed was *ultra vires*; and if this is answered in the affirmative, the corporation should not be held liable for the act, except on principles of acquiescence and ratification of the employment or transaction." . . . Taylor on Corporations, § 338.

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## STEARNS

v.

## PULLMAN CAR COMPANY.

(8 *Ontario Reports*, 171.)

The plaintiff was a passenger on one of defendants' cars occupying a sleeping berth. Before going to sleep he had undressed himself and had put his pocket-book containing his money in his trousers' pocket, rolling up his trousers and putting his suspenders around them, and then placed them under his pillow next the wall. When he was called before arriving at his place of destination, he discovered that his pocket-book and money were gone. No negligence in the defendants was shown.

*Held*, that no liability attached to the defendants.

THIS was an action tried before Cameron, C. J., and a jury, at the Fall Assizes of 1884, who directed a nonsuit.

*Britton*, Q. C., supported the order.

*Bethune*, Q. C., *contra*.

GALT, J.—This action is brought to recover a considerable sum of money which the plaintiff alleges was stolen from him while he was a passenger in one of the sleeping-cars of the defendants, and asleep. The story told by the plaintiff is, that on the night of the 27th of June, 1878, he occupied a sleeping-berth, and went to bed, having previously undressed himself, and having taken off his trousers he rolled them up and put the suspenders round them, and placed them under a pillow, and put them under his head next the wall, and went to sleep; he had placed his pocket-book containing the money in the pocket of his trousers. He intended to stop at Kingston. When he was called before arriving at Kingston he got up, and when he came to get dressed he noticed it was all loose, and when he put his hand in his pocket the pocket-book and money were gone.

There was no other evidence. The plaintiff himself admits in answer to the question, "Did you see anything you thought was negligent on the part of the porter or conductor; you said before you did not?" A. "I cannot say that I saw anything to indicate that either porter or conductor had been negligent on that occasion." "I did not see it myself; whatever he says that is enough, I say as now, I did not see anything myself."

He then proceeds to state he thought there was negligence, because a man had got off the train at Edwardsburg; but it does not appear whether that man had been a passenger in the sleeping-car, or whether he was simply a passenger on the train; and, moreover, the man had left the train before the plaintiff discovered he had lost his money, so there was no reason whatever to suspect him of having done anything improper.

Mr. Britton relied very strongly on a case of Pullman Car Co. v. Gardner, before the Supreme Court of Pennsylvania, in error from the Court of Common Pleas, 16 Am. & Eng. R. R. Cas. 324.

That was an action brought by the respondent against the appellants to recover the value of a watch and sum of about sixty dollars that had been stolen from him while asleep in one of the cars of the defendants, in which the respondent was successful both in the court below and in the Supreme Court. But that case differs essentially from the present. At the trial it was proved that by the regulations of the company it was the duty of one of the porters to be continually on the watch during the night.

To quote the words of the learned Judge in his charge to the jury: "We have it in evidence that the company has done its whole duty as a company. They require a constant watch to be kept by some person in the body of the car where the sleepers are, watching continuously. . . . If watch was kept by one, I apprehend it would be sufficient. . . . They kept a guard according to their regulations, and intended keep a continuous watch, so that a man sitting there could see everything that was going on with-

out interfering with the sleepers. He would have no business to be away except in a special case." It appears from the evidence that a colored man, one of the porters, was put in charge by the conductor, and that it was his duty to stay in the aisle continuously to watch there until daylight, and by his own admission he went out of the aisle to black a pair of boots. The learned Judge then directed the jury that "if he went out of that aisle, even for a very few minutes, and during that time this robbery occurred, and the jury believe that if he had been in his place of observation, it would not and could not have occurred without detection, the company is liable, because he failed to do his duty to that extent that it allowed this robbery to be done. It was his fault, and it is visited on the company, although they may have done everything they thought right to get a proper man."

This was the question on which that case turned.

It is plain there is nothing of the kind before us. All that is alleged is, that the plaintiff lost his money while a passenger on board a car of the defendants, and therefore the defendants are liable, although it is not shown or alleged that either they or their servants were guilty of any negligence, a position which is not borne out by Gardner's case, nor by any other of which I am aware.

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C. Co.

ROSE, J.—I agree that the rule must be discharged. Unless the mere fact of loss is presumptive evidence of negligence on the part of the company, and of such negligence as would render them liable to make good the plaintiff's loss, there is no evidence to entitle the plaintiff to call upon the defendants to offer defence, and the non-suit was right.

There is much common sense (if I may be allowed to use the expression) in the charge of Matthews, J., in the case of Pullman Palace Car Co. v. Gardner, 16 Am. & Eng. R. R. cas. 324, where he told the jury that "in the case of a sleeping-car company, the great convenience and inducement held out to passengers is that they will give them a comfortable night's rest. They notify them they will make them pay for it, and say to them you may go to sleep. The principal part of the arrangement is the advantage the passenger will have over the ordinary car in that he can lie down and go to sleep." He continues: "When you have gone to sleep, of course, you can't take care of yourself. Everybody knows that, and for that very reason, the fact that the company notifies you to lie down and shut your eyes, and go to sleep, and thus become helpless, it is their duty to take care of you while you do sleep; not that they are insurers; not that they say you shall not be robbed or cannot be robbed; but they will use reasonable and ordinary care to prevent people intruding upon you, and picking your pockets or carrying off your clothes while you are asleep."

While I agree that the plaintiff in this case fails, I do not say no state of facts could be presented to the Court upon which the defendants would be held liable.

To show the caution which should be exercised in determining such liability, I give the closing words of the judgment of Weldon, J., in the *Pullman Palace Car Co. v. Smith*, 24 Am. R.R. 258, 262: "Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railway company; and if appellant were a carrier, it would not be liable for the loss in this case because the money was not delivered into the possession or custody of the appellant, which would be essential to its liability as carrier," citing *Tower v. Utica and Schenectady R. R. Co.*, 7 Hill. 47. He adds, "In *Redfield American Railway Cases*, 138, it is said: 'But it has never been claimed that the passenger carrier is responsible for the acts of pickpockets at their stations, or upon steamboats and railway carriages.'"

He continues: "It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its custody at all, of which it had no information, and which the owner had concealed upon his own person. The exposure to the hazard of liability for losses through collusion for pretended claims of loss where there would be no means of disproof would make the responsibility a fearful one. Appellee assumed the exclusive custody of his money, adopted his own measures for its safe keeping by himself, and we think his must be the responsibility of its loss."

I cite this language to show that when we adjudge such a company liable, it must be on clearly defined principles, and upon the clearest evidence.

CAMERON, C. J., concurred.

Order discharged.

**Liability of Sleeping-car Companies—Cases Reviewed.**—Before stating any conclusions as to the liability of sleeping-car companies, it will be well to review the cases wherein such liability has come in question. In *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. (N. S.) 352, Welch went to bed in a sleeping-car, placing his overcoat in a vacant berth overhead. In the morning it was missing and he sued to recover its value, and got a judgment therefor, which was, however, reversed. In *Pullman Palace Car Co. v. Gaylord*, 23 Am. Law Reg. N. S. 788, Gaylord placed a scarf, having upon it a \$300 diamond pin, in the receptacle intended for articles of clothing and placed at the head of the berth. The pin was stolen, suit was brought, the company demurred, and on appeal the demurrer was sustained. In *Blum v. Southern Pullman Palace Car Co.*, 3 Cent. L. J. 591, Blum put his waistcoat, containing his wallet and money, under his pillow. It was the custom of the company to have its conductor and porter keep awake during the night, but on this night they went to sleep. In the morning the wallet and money were gone and Blum got judgment for their value. See, also, *Blum v. So. Pull. P. Car Co.*, 1 Flip. 500. *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, is a case similar to the *Blum* case, but no negligence of the company was shown, so *Smith* did not recover anything. In *Pullman, etc., Co. v. Gardner*, 16 Am.

and Eng. R. R. Cas. 324, Gardner put his watch and pocketbook under the outside corner of the mattress of his berth, went to sleep, and next morning both money and watch were gone. The watchman, who should have been on duty, had been negligently absent, and Gardner got a judgment, which was affirmed by the Supreme Court of Pennsylvania in 1883. Woodruff, etc., Co. v. Diehl, 9 Am. and Eng. R. R. Cas. 294, presents almost the same state of facts as the Gardner case, and, as there, a judgment against the company was affirmed by the Supreme Court of Indiana, in 1882. These, so far as we are advised, are all the sleeping-car cases in which the liability of the company is defined, save one, the case of Parmeter v. Wagner, briefly reported in 11 Alb. Law Jour. 149, wherein the Marine Court of New York held that the sleeping-car company were not insurers, innkeepers, nor transporters, nor liable, in the absence of negligence, for passengers' property lost on the cars.

**Liability as an Innkeeper Discussed.**—In some of the cases it has been sought to hold the company liable as an innkeeper. But this has been expressly overruled by the courts in almost all of the above cases. The best statement of reasons why a sleeping-car company is not liable as an innkeeper is found in *Blum v. South. Pull. P. Co.*, 1 Flip. 500.

1st. The peculiar construction of sleeping-cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection.

2d. As a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping-car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to prepayment.

3d. The innkeeper is obliged to receive every guest who applies for entertainment. The sleeping-car receives only first-class passengers travelling upon that particular road, and it has not yet been decided that it is bound to receive those.

4th. The innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping-car furnishes a bed only, and that, too, usually for a single night. It furnishes no food and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging.

5th. The conveniences of a public inn are an imperative necessity to the traveller, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveller by rail, however, is under no obligation to take a sleeping-car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose.

6th. The innkeeper may exclude from his house everyone but his own servants and guests. The sleeping-car is obliged to admit the employees of the train to collect fares and control its movements.

7th. The sleeping-car cannot even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare or violation of its rules and regulations. I hold, therefore, that sleeping-car companies are not subject to the responsibility of innkeepers at common law, and that defendant cannot be held liable upon that ground.

**Liability as a Carrier Discussed.**—Nor is a sleeping-car company liable as a carrier. It is not a carrier. The railway company is the carrier. More than this, a carrier's liability depends upon his possession of the goods. A

sleeping-car company does not have possession of the goods. They are in control of the passenger. *Pullman, etc., Co. v. Smith*, 73 Ill. 360; *Pullman, etc., Co. v. Gaylord*, 23 Am. Law Reg. N. S. 788.

**But Sleeping-car Company is Liable for Negligence.**—The true rule is laid down in *Pullman, etc., Co. v. Gardner*, 16 Am. and Eng. R. R. Cas. 329: "The main object in taking passage in such a car is to permit the passenger to sleep. While in that helpless condition, a duty rests on the company to provide reasonable care and precaution against the valuables of a passenger being stolen from his bed or from the clothes on his person. This is not the case of robbery by force and violence, but by stealthy larceny. Unless a watchman be kept constantly in view of the center aisle of the car, larceny from a sleeping passenger may be committed without the thief being detected in the act." See, also, upon the general subject of liability of a railway company for loss of parcels in custody of passenger, *Henderson v. Louisville, etc., R. R. Co.*, 20 Fed. Repr. 480; a. c., 16 Am. and Eng. R. R. Cas. 397. As to the duty of sleeping-car companies to furnish accommodations, see *Pullman, etc., Co. v. Taylor*, 65 Ind. 153; *Nevin v. Pullman, etc., Co.*, 106 Ill. 222.

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### TEXAS AND PACIFIC R. R. Co.

v.

CURREY.

(*Advance Case, Texas. April 25, 1885.*)

The general allegations of damages will suffice to let in proof, and to warrant recovery for all such damages as naturally and necessarily result from the wrongful act complained of; the law implies such damages, and proof is only necessary to show the extent and amount.

Where the damages actually sustained do not necessarily result from the act complained of, and consequently are not implied by law, the pleader must allege the particular damage which he has sustained for notice thereof to defendant; otherwise he will not be permitted to give evidence of it on the trial. The rule is satisfied, when from the facts alleged the law infers other facts; whatsoever the law infers from a given state of facts the adverse party is presumed to know, and must take notice of it whether specially pleaded or not.

Where it is alleged that by reason of the injuries sustained plaintiff has become permanently disabled and a cripple for life, and will never recover from the effects thereof, and that he was greatly injured, cut, bruised and wounded internally and externally about his hip and spine, and is wholly unable to attend to the transaction and performance of his usual and necessary business, and has so continued from the time of the accident to that of the suit, the law infers that physical pain and mental suffering resulted therefrom.

APPEAL from Tarrant County.

*Davis, Beall & Rogers* for appellant.

*Ball & McCart* for appellee.

Appellee brought this suit against the appellant to recover damages for personal injuries received as a passenger on appellant's



train near Millsap, alleging, in substance, that said defendant failed to keep its track and cars in repair, and so carelessly and negligently operated their said cars that said train upon which plaintiff was travelling as a passenger was thrown from the track, whereby he sustained serious injuries in the hip and spine, rendering him a cripple for life, and claiming actual damages in the sum of \$20,000; also exemplary damages in the sum of \$5000, for alleged gross negligence and conscious indifference of defendant. A trial resulted in a verdict and judgment for \$5000.

The petition alleged that while plaintiff was a passenger on defendant's train, it conducted itself so carelessly and with such gross negligence, and with such conscious indifference to its own duties, and to the rights of plaintiff in respect to keeping its railroad track and cars in repair, and in respect to operating the same, that by its carelessness and gross negligence and default the said car was run off the track of said railroad, and thrown down the embankment thereof, so that plaintiff thereby became sick, and was greatly injured, cut, bruised and wounded, internally and externally, about his hip and spine, and was wholly unable to attend to the transaction and performance of his usual and necessary business, and has so continued from then until now. And plaintiff avers that by reason of said injuries, he has become permanently disabled and a cripple for life, and will never recover from the effects thereof.

The court charged the jury as follows: "If you find for plaintiff, you may take into consideration in estimating damages, if any has been shown by the testimony, mental and physical pain and suffering, the nature, extent and probable duration of the injury, and impaired capacity to earn money or pursue an occupation."

It is not claimed that the verdict is excessive, and but two errors are assigned for a reversal of the judgment; these are noticed in the opinion.

STAYTON, J.—The petition alleges that while the appellee was a passenger in one of the appellant's cars, "through its carelessness, gross negligence and default, the said car was run off FACTS. the track of said railroad and thrown down the embankments thereof, so that plaintiff thereby became sick and was greatly injured, cut, bruised and wounded internally and externally about his hip and spine, and was wholly unable to attend to the transaction and performance of his usual and necessary business; has so continued from then until now. And plaintiff avers that by reason of said injuries he has become permanently disabled and a cripple for life, and will never recover from the effects thereof, to his actual damage \$20,000," etc.

There was no special demurrer to the petition, except in so far

as it sought to recover exemplary damages, and in this respect a demurrer to the petition was sustained. The evidence was sufficient to show that the injuries resulted from the negligence of the appellant, and that they were of the character alleged.

The court, among others, gave the following charge to the jury: "If you find for plaintiff, you may take into consideration in estimating damages, if any have been shown by the testimony, mental and physical pain and suffering, the nature, extent and probable duration of the injury and impaired capacity to earn money or pursue an occupation." It is not claimed that this charge was erroneous as a legal proposition applicable to the measure of damages in cases founded on personal injuries; but it is claimed that, in the absence of some pleading setting up mental suffering as an element of damages in this case, the jury should not have been permitted to consider it.

The rule regulating pleading in this class of cases is thus stated: "The general allegation of damages will suffice to let in proof and to warrant recovery of all such damages as naturally result from the wrongful act complained of; the law implies such damages; that is, damages of that sort, and proof only is necessary to show the extent and amount. But, where damages actually sustained do not necessarily result from the act complained of, and consequently are not implied by law, the plaintiff must state in his declaration the particular damage which he has sustained, for notice thereof to the defendant; otherwise, the plaintiff will not be permitted to give evidence of it on the trial." 3 South-  
ALLEGING DAMAGES—RULE.
erland on Dam. 426.

The same rule is adopted by Mr. Sedgwick, who refers to the more enlarged and particular statement of rule made by Mr. Chitty as the correct rule and exposition of the reasons on which it is based. 2 Sedgwick on Dam. 606. This is a just rule of pleading, for it requires the person seeking relief, by his pleadings, to inform the adverse party of the facts upon which he intends to rely for a recovery, thereby avoiding surprise. The rule, however, is satisfied when from the facts stated the law infers other fact or facts; for whatsoever the law infers from a given state of facts the adverse party is presumed to know, and must take notice of it whether it is specially pleaded or not.

The law infers when such injuries to the person are shown to have existed as are alleged and proved in this case, that  
PAIN PRESUMED.
physical pain resulted therefrom; for by common observation we know that in the ordinary operation of natural laws pain is a necessary result of such injuries, unless the condition of the injured person be abnormal, which will not be presumed. This is equally true as to mental suffering, for it is contrary to common experience and the laws of man's existence and nature that any sane, healthy and robust person, by physical injuries, may be a

cripple for life in a matter affecting his health, comfort and capacity, without mental pain resulting from the changed condition.

No proof is required to be made of these things which every person is presumed to know, as it is not required the proof be made of a fact necessarily resulting from facts proved, then it is not necessary to allege the resulting fact, for it is understood to be averred by the averment of the facts from which it necessarily results. This rule has been often recognized in actions for personal injuries. *Phillips v. Hoyle*, 4 Gray, 571; *Folsom v. Town of Underhill*, 36 Vt. 592; *I. & St. L. R. R. v. Stables*, 67 Ill. 320; *C., B. & Q. R. R. v. Warner*, 18 Am. & Eng. R. R. Cas. 103; *Wright v. Compton*, 53 Ind. 342; 1 *Southerland on Dam.* 766; 3 *Idem*, 259, 268, 426; 2 *Wharton's Evidence*, 1293-1296.

We are referred to the case of *I. & G. N. R. R. v. Irvine*, 18 Am. & Eng. R. R. Cas. 294, as a case establishing a rule different to that stated above. While the general rules applicable to cases of this character are correctly stated in that case, it may be true that there are expressions in the opinion which, as applicable to the averments of the petition, would be a misapplication of the law, however correct the decision may have been under the facts of the case.

The rejected testimony of the witness, Green, was not offered until counsel for plaintiff was making the closing argument, although the counsel for the appellant knew that the witness was on the train at the time the accident, by which the appellee was injured, occurred, and that he was in court during the trial. We find no bill of exceptions taken to the ruling of the court rejecting the evidence, and might very properly refuse to revise the action of the court below in this respect. We deem it proper, however, to say that there was no error in the ruling of the court, for several reasons. There was evidently a failure to offer the evidence at the proper time, and in such cases the ruling of the court below in refusing to admit the evidence would not authorize a reversal of the judgment even if it appeared that the evidence was admissible and important. The evidence sought to be introduced, however, was so remote that it was exceedingly doubtful if it should have been admitted if offered at the proper time, for it in no manner identified the person of whom the witness spoke as the plaintiff in this case, and without such identification, it being shown that many persons were injured at the same time and place.

There is no error in the judgment, and it is affirmed.

Affirmed.

**Defences to Actions for Injuries to the Spine. Strains of the Back.**—This note is not written for the purpose of belittling spinal injuries or of minimizing their terrible consequences. It may therefore be frankly conceded that no injuries entail suffering more prolonged or misery more cumulative than those which affect the spinal cord. It may also be as frankly said that

where undoubted injury of the spine exists as a result of a negligent railway accident, the sufferer should meet with the utmost fairness and liberality consistent with reason and justice, when he presents his claim for damages to the railway officers and counsel whose duty it is to adjust and pay it. "There is indeed," says Page ("Injuries to the Spine and Spinal Cord," p. 1), "no organ in the human body whose structural damage is fraught with such grave results; for whether we regard it as the conductor of impressions to and from the brain, as the co-ordinating centre of orderly automatic movements, or as the controlling guardian of healthy nutrition and change, the integrity of this part of the cerebro-spinal axis is essential for the due performance of its varied functions. Were the spinal cord a shapeless mass like the liver or the spleen, it is conceivable that severe damage might be done to it without interference with its peculiar functions, but being as it is a slender cord, injury like the broken link in a chain renders its function inert, revealing how the integrity of the whole depends upon the integrity of a part. To have the use of the limbs impaired, or altogether lost; to have them cut off, as it were, from the sentient life of the organism, is an infliction which, whether the result of injury or disease, very rightly awakens the sympathy of mankind." Money cannot adequately compensate for injuries fraught with such consequences as these. It is perhaps the best reparation that can be made; and in cases of spinal injury resulting from negligent railway accidents pecuniary compensation should be liberal in amount and paid without unreasonable delay or vexatious litigation. This remark, however, must be understood as applying only to cases of clear, certain, undoubted spinal injuries, and this suggests for consideration the distinctions between those injuries to the spinal cord which are real and deserve to be compensated as such and those which, though often referred to the spinal cord, are not in truth injuries of that organ at all.

**Back Strains.**—Injuries to the back which may be mistaken for spinal injuries are sprains or strains of the muscles and ligaments of the back. A man is in a railway accident. He is jerked, twisted, and thrown unexpectedly in many directions, striking the seats of the car, his fellow-passengers, and other objects, trying perhaps at the same moment to hold to something and save himself from hurt. His endeavors to brace himself and hold to something are overcome, and he is hurled amid the *débris* of the wreck. Yet all the injury he may sustain is severe straining of the muscles of the body. The spinal cord may not be at all injured. "We do not," says Page ("Injuries to the Spine and Spinal Cord," 117), meet with such cases in ordinary practice, but we see no reason why the whole trunk may not be so suddenly rocked and swayed from side to side and backwards and forwards that, with the free movement allowed to it in every direction by its many joints, the innumerable muscular and ligamentous attachments of the spinal column may not be strained and stretched; thus causing pain, severe in character throughout almost the whole length of the back. Railway collisions, however, provide the conditions which determine the possibility of such extensive strain of the vertebral column. Now one part, now another, is sprained in the jerks and jolts which accompany most collision accidents, and the pain, more commonly situated in the lumbar region alone, may thereupon affect other parts of the column. And very variable may be this pain, both in range of distribution and in character."

Examples of strains to the back resulting from railway collisions are found in the medical books. It is worth while to give several recorded by Dr. Page in his practice as surgeon of the London and Northwestern Railway Company.

Case 1.—**M. A.**—, a strong and active man, was riding in a first-class carriage, when a slight collision took place. He was, at the moment, leaning forwards reading, and was not even moved from his seat. He felt a little upset and shaken, and had some brandy in consequence, but he was able in

a few minutes to set off and walk to his business. The next day he felt some pain in the lumbo-sacral region, which on the following day became acute, especially on movement, and on the third and fourth days after confined him to the house. He was ordered a belladonna plaster, and in a week he began to improve, though having occasionally sharp pain. There was no local tenderness.

"It is clear from this history," says Dr. Page, "that the injury was a simple sprain of the muscles and ligaments about the lumbo-sacral region. It was, in fact, a 'traumatic lumbago.' A slight collision, such as this man was in, has the tendency to throw the body suddenly backwards or forwards, and, although in this case the patient had not been moved, the momentum is usually sufficient to throw or jerk the traveller from his seat. Unconscious effort is probably made at the instant to hold the back rigid, and we find, as a result of the violence and of the sudden resistance induced by 'setting' of the muscles and ligaments, that the ligaments are stretched, and the muscular attachments are likewise strained in the dorso-lumbar or lumbo-sacral regions of the column. The injury is precisely the same as that which we meet with in every-day practice, where a man complains to you that while lifting a heavy weight he suddenly felt a severe and acute pain, which almost prevented him from moving, in the lower part of his back. 'This sudden pain is probably caused by cramp or the rupture of some fibres of a muscle during the act of contraction.' See lecture on 'Backache,' by Dr. Geo. Johnson, F.R.S., 'British Medical Journal,' vol. i. 1881, p. 222. You examine him and can find no external sign of injury to the back, but he hesitates to stoop when you ask him, he holds his back unnaturally stiff, he finds it difficult or impossible to rise from his seat, and very likely there is some local tenderness in the muscular mass on either side of the lumbar vertebrae. The case recited is one of the most common and most simple kinds, but we may meet with the same injury in very different degrees of severity." Page, "Injuries to the Spine and Spinal Cord," 114, 115.

Case 2.—A rather smart collision caught a man, *æt.* 58, sitting upright in the carriage with his head slightly turned to one side. He was thrown back, and his head was knocked against the carriage, the brim of his hat fortunately saving him from a severer blow. He felt shaken and sick, but did not vomit. Within a couple of hours of the accident he was seized with pain, and tenderness was felt in the lower part of the back, especially over the two lower dorsal and two upper lumbar vertebrae. He was taken home and put to bed, where he lay for a month suffering at first from such severe pain throughout the whole spine—cervical, dorsal, lumbar, and sacral regions—that he was barely able to move. There was never any acceleration of pulse, elevation of temperature, or peripheral pain. At the end of the month he began to improve, and was able to move his arms and his head without pain, and occasionally to sit up in bed. In a couple of months he was able to get up, and in three months to move about so well as to do a little business. He gradually recovered, and is now, five years after the accident, in good health, though when travelling he still feels an "uncertainty," and unless he carefully supports himself is liable to have a return of pain in the lower part of the back.

"These cases," writes Dr. Page, "afford good examples of the same kind of injury, though at the two ends of the scale. It must not, however, be thought that it is usual to meet with cases such as these where there is no other complication. 'Nervous shock' in its varied manifestations is so common after railway collisions, and the symptoms thereof play so prominent a part in all cases which become the subject of medico-legal inquiry, whether they be real or feigned, that we are almost sure to meet with the symptoms of it associated with pains and points of tenderness along the vertebral spinous processes. From what we have ourselves seen, and from the arguments which we have often heard used about individual cases, we cannot help think-

ing that it is this combination of the symptoms of general nervous prostration or shock and pains in the back, such as these two cases presented, which has laid the foundation of the views—erroneous views as we hold them to be—so largely entertained of the nature of these common injuries of the back received in railway collisions." Page, "Injuries to the Spine and Spinal Cord," 116, 117.

Case 3.—E. H. D——, aged 35, received in a severe collision "a blow," as he expressed it, "down his whole back," and also on the back of his head from a falling carpet-bag. He did not consider himself much hurt, although from the account of his appearance there must have been a considerable degree of shock. He proceeded on his journey, but three quarters of an hour after the accident he felt compelled to stop and go to bed at a neighboring inn. He then began to suffer from severe pain in the head, and from pain down the whole of the spine, but more especially about the sacrum and the lower cervical region. There were no marks of bruising. He also complained of "numbness and tingling" in his limbs, with some difficulty in moving them. He suffered for three days from extreme nervous prostration; dreaded the least noise; spoke only in a whisper, and lay in a darkened room. There was, however, no disturbance of pulse or temperature, and he had been able to sleep without narcotic for a few hours on the night after the accident. On the following days his limbs felt more natural, and the tingling and sensation of numbness had very much lessened. In five days these sensations had completely disappeared, but he still suffered from much pain about the vertebral column, and movements of the neck and trunk were painful to him. He was excessively nervous, and much dreaded any examination of his back. The pulse and temperature were throughout normal. He continued steadily to improve, and in three weeks was able to be moved. In three months he was going out daily, walking slowly about three miles a day, but complaining much—especially under examination—of pain in and about his vertebral column, the movements of which were evidently stiff and painful. He was still very nervous and felt generally weak, but there was no impairment of motion or of sensation in his limbs. He returned to work in about seven months. Five years after the accident he was at work and in good health, though often complaining of his back, and that "especially when lifting heavy weights."

It is worth while, now, to examine some of the symptoms which may be taken to be evidence of spinal injury.

1. *Pain*.—Do pain and tenderness in the back prove spinal injury? "It is worth inquiring *what* we press when we exert pressure on the vertebral column. Obviously, first, the skin; then the muscles, bones, and ligaments; but never the spinal cord or its membranes, unless the bones or ligaments be destroyed. An inspection of the vertebral column will convince the reader at once of this truth. The length of the cervical spines, the overlapping of the dorsal, not to mention the strong ligaments and massy muscles covering the transverse processes, render the spinal cord as secure from pressure without as is the brain. Is spinal tenderness of any value as a diagnostic sign? The answer is, that disease of the vertebræ, and even of the cord itself, may go on to an extraordinary extent, with very little or no tenderness of the vertebral column, and with but slight functional derangement of the organs in connection with the spinal cord." Laycock, *Nervous Diseases of Women*, 330. Page gives an instance of undoubted injury of the spinal cord which resulted in death, but in which there was *no marked tenderness*, although the patient complained of pain in the lower part of the back. Pain "is a fallacious monitor in regard to diseases of the spine. It fails to warn when danger is imminent, and it alarms needlessly." 4 *Holmes's System of Surgery*, 106; *Shaw's Essay on Diseases of the Spine*. "Pain referred to the spine is occasionally present in organic disease of the cord, but is more frequent in disease originating in the meninges or bones. But the frequency with which

spinal pain is present in abdominal, especially gastric, disease, and in neuralgic affections, lessens the diagnostic value when it exists alone. It is probably no exaggeration to say that of one hundred patients who complain of spinal pain, in ninety-nine there is no spinal disease." Gowers, *op. cit.* 41. "In all spinal affections, we look to the back to discover if there be any disease in the vertebral column, and we generally percuss it. Now, as regards any value to be derived from this method, I think we must set it down as very small. We, of course, examine the spine, for, by so doing, we may discover a projection or a growth; but as for informing us of the condition of the medulla within it, percussion seldom does that. Of course, should disease exist between any of the vertebrae, any violent jar on the back would be likely to produce discomfort; but, as a rule, in slowly progressing disease of the cord, as in the majority of cases of paraplegia which we meet with, there would be no pain produced. At the same time, a sensitiveness of the spine is very common, but this generally implies a simple functional hyperæsthesia, so that I verily believe that were you to test the value of this method of diagnosis by the rule of averages, you would find pain mostly absent in organic diseases of the cord, and present in those persons who suffered merely from nervous excitability." Wilks, *op. cit.* p. 199.

There appears among medical authorities a general concession that there may be pain as a result of spinal injury, although that, taken alone, it is not conclusive as to the existence of such injury. It is probably true to say that it is in all cases a subordinate, minor symptom, and that in cases where it is alone and prominently relied upon as the proof of spinal injury, there probably is no such injury at all. "In the absence of other signs of injury," says Page, "do not, therefore, let us give undue weight to this pain and tenderness at one or more points of the spinal column. When we meet with cases of real damage to the spinal cord or its membranes, we shall see of how small value this pain and tenderness become as signs of the disease. They may help to localize the point at which mischief is going on, but they do not indicate the mischief itself, nor are they in any sense pathognomonic symptoms of spinal-cord disease. 'I fear it must be admitted that the great importance of the spinal cord, and the gravity of its diseases, have rather tended to make professional men overlook the osseous and ligamentous case by which it is enclosed, and which is liable to all the maladies that befall bones and ligaments elsewhere.' Hood, *op. cit.* p. 144. 'Of this we feel quite sure, that were these conditions of vertebral-column injury more frequently recognized and more correctly estimated, we should hear less of the 'railway spine,' with its attendant evils, and we should see fewer errors in diagnosis as to the existence of disease of the spinal membranes or of the spinal cord. In no wise do we seek to lessen the real importance of these vertebral sprains. They may be exceedingly distressing to the patient; the pains may last for a very long time; there may even be occasional reminders of pain for months or years under suitable conditions; but it is right that we should attach no more import to them than they deserve, and that their existence should not entail a needless dread of serious injury to the structures within the spinal canal." Page, *Injuries to the Spine and Spinal Cord*, 122.

*Pseudo-Paralysis.*—"Spinal pains," says Page, "may give rise to a form of pseudo-paralysis which, if unrecognized, may cause unwarranted alarm to ourselves and our patients." (*Injuries to the Spine and Spinal Cord*, 120.) The pain is so great and so constant that the patient becomes afraid to move.

"This well-grounded fear of moving may soon assume the importance of an absolute inability to move. Ask any man who has had a severe lumbago, whether from a sprain, from rheumatism, or from cold, if he has not at the same time felt a strange sense of difficulty in moving his legs. Brisk walking becomes impossible; the effort needed to put one leg before the other

must be unnaturally great; fatigue comes on early, and the patient complains to you that his legs feel weak and as if he could hardly move them. Free micturition may likewise be interfered with, from lack of the natural support and help which the lumbar muscles provide when this act is being performed. The patient perhaps cannot completely empty his bladder, and there is a certain amount of dribbling at the close of the act. It thus appears to himself that his 'water runs from him,' and if thereto, as a consequence of slight retention, there be added some irritability of bladder, symptoms of somewhat ominous import seem to be developed. This bladder trouble may rise into considerable prominence especially when the nervous system has been much upset by the shock of the accident, and we may get a condition of 'nervous bladder' in which the patient has a frequent desire to pass water with inability at the same time to perform the act perfectly, and consequent slight dribbling at its close. Constipation also arises from the same muscular incapacity, and becomes an almost invariable feature in the case. Thus it is nothing more nor less than natural for the patient to say that the patient is 'paralyzed,' and paralyzed from severe injury to the spine. If we do not avoid these fallacies, and do not correctly interpret this state of things, we shall add greatly to the dread, which after railway collisions may be very real, that 'paralysis is going to supervene.' Page, *Injuries to the Spine and Spinal Cord*, 121.

A class of injuries to the back has been above described that may fairly be distinguished from genuine injuries to the spinal cord. They are in reality strains of the muscles and ligaments of the back. They should be so considered, and compensation paid accordingly. The diagnosis of these injuries must necessarily be left to medical practitioners of skill and experience; but if this note serves in some degree to familiarize counsel and officers, before whom claims for such injuries are made, with their nature, so that they may act with greater intelligence in adjusting the claims, or in examining medical and other witnesses in the event of their litigation, the purpose of the writer will have been attained.

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## DICKINSON

v.

## PORT HURON AND NORTHWESTERN R. R. Co.

(53 *Michigan*, 43.)

It is negligence in a railroad company to allow coal-bins so close to its track that persons upon an excursion car cannot safely stand, while passing them, upon the running board that stretches along the side of such a car.

A passenger on an excursion train was allowed to leave one car and go into another to sell tickets. He had left his wife on the first car, which was an open one, the seats being reached from an outside running board instead of an inside aisle. The running board was used by the conductor and trainmen in passing from point to point. *Held*, that it was not necessarily negligent for the passenger to suppose that he also could use it safely, and try to do so in returning to the car where his wife was. And supposing it to be safe, as it should be, it was not negligent to omit to look out for structures so close alongside the track as to endanger persons who had to be on the running board while passing them.



**ERROR** to Saginaw.

Case. Defendant brings error. **Affirmed.**

*Wisner & Draper* for appellant.

*Edget & Brooks* for appellee.

COOLEY, C. J.—This suit is brought to recover damages for a personal injury sustained by the plaintiff while being carried on the cars of defendant as a passenger. FACTS.

The injury was received August 9, 1883. On that day, by arrangement with defendant, an organization at East Saginaw, known as the "Ladies' Christian Temperance Union," gave an excursion from East Saginaw to Port Huron and back. Tickets for the excursion were placed in the hands of a committee of ladies, and they sold them for one dollar and fifty cents each, and accounted to the defendant for one dollar each. On the morning of the day named plaintiff and his wife took the cars with the excursion party. The train was the regular passenger train of closed cars, with two open excursion or observation cars attached. These last were constructed with seats running across the cars, and without any aisle from end to end. Along one side was a step or running board about nine inches in width, upon which passengers stepped in entering and leaving the car, and along which the conductor walked in taking up tickets. There were iron rails by each seat for one to hold by who was upon this step. The seat which the plaintiff and his wife took was upon the first of these open cars. The closed cars were before it.

After the plaintiff had taken his seat he got off again at the request of the ladies to sell tickets for them. As the train was about to start, several persons came to take the cars who were without tickets, and the conductor told the plaintiff to let them get aboard the train and sell them tickets afterwards. They went into one of the closed cars, and plaintiff followed them and sold tickets to them. While he was doing this the train started. The plaintiff then left the car where they were, and from its rear platform passed to the front platform of the car on which he had left his wife, and then along the side step towards the rear of the car. The train was then moving with considerable speed. As the plaintiff passed from seat to seat, he inquired of the passengers if they had tickets. A brakeman was then passing along and closing blinds on the side of the car for the protection of passengers. These blinds, when closed, came up to the shoulders of the seated passengers. The brakeman passed the plaintiff by swinging around him when he was near the middle of the car, and as he did so, said to him: "You want to look out a little for the switch." Very soon the plaintiff, as he was moving, heard the brakeman halloo and motion with his hand towards the car. The plaintiff says: "I took him for my guide and saw the bins, and I knew there was no time to fool

away, and I drew myself up to the car as he was doing, taking him for my guide, and then he threw one hand back, and I had got to get back and jump myself, and I made a lunge and grabbed the last iron, and drew my head and shoulders around the end, and the bin struck my thigh and smashed me through there some sixty feet."

The bins referred to, and against which the plaintiff struck, were coal-bins extending along the side of the track some sixty-five feet, and coming within eleven and a half inches of the side of a car standing on the track, and within two inches of the step upon which plaintiff stood. The height of the bins was five feet. Plaintiff's leg was broken by the concussion. It was shown that the bins might have been seen from the approaching cars for a distance of twelve hundred feet. When plaintiff left the closed car on which he had been selling tickets, there were unoccupied seats in it which he might have taken had he been so disposed.

In the trial court it was urged on the part of the defence that the facts in proof made out no case for the plaintiff—first, because they showed no breach of any duty which the defendant owed to the plaintiff; and, second, because the injury was brought upon the plaintiff by his own negligence. On the first point the trial judge ruled against the defence, and on the second he submitted the facts to the jury, who found for the plaintiff.

We agree with the trial judge that it was negligence in the defendant to permit bins of the kind described to stand so near its track when it was making use of the open cars for the conveyance of passengers. It is true that passengers are expected to take and keep their seats in the car: it is not expected that they will stand upon the step or running board when the cars are in motion: this step or board is provided for the use of the servants of the company, and it will not be expected that passengers will make use of it for passing back and forth while the cars are moving, unless under very exceptional circumstances. But this means of passage takes the place of the aisle in the common passenger coach; and as it is always possible that there may be lawful and proper occasions for passing from car to car, it is not excusable in the defendant that it should permit structures to stand so near its track as to render the use of the running board dangerous to life or limb. The servants of the company must make frequent use of this passage-way between stations, and they have a right to reasonable security against injury in doing so. And while we think the passengers are not at liberty to pass from car to car at will, and that they should keep their seats when the train is in motion, yet in view of exceptional cases which may well arise, and in which the passenger would be likely to consider it proper to make use of the step or running board as this plaintiff did, we are entirely of the opinion of the circuit judge that the defendant owed

NEGLIGENCE TO  
PERMIT COAL-BINS  
TOO NEAR TRACK.

a duty to its passengers to make such use, by them, on occasions justifying it, reasonably safe.

We also agree that the facts did not make out a conclusive case of negligence against the plaintiff. The principal circumstance urged against him is that being in the close car where there were empty seats when the train started, he did not take a seat there until the next station was reached. But the plaintiff had been permitted to enter that car for the purpose of selling tickets, after he had taken a seat elsewhere with his wife, and on an understanding that the cars were to be immediately started; and he would naturally suppose that he was at liberty, when he had completed the business he went forward on, to return to his own seat. And, unless he knew it was dangerous to walk upon the running board, it would not have been likely to occur to him that there were objections to his doing so. This passage-way seemed to be safe. The step was wide enough for the feet, and, with the irons to take hold of in moving along, there was no appearance of danger if care was used; and so long as the servants of the company were using the passage-way frequently, and were required to do so in the regular performance of their duties, it would have appeared like excessive timidity if the plaintiff had refrained from passing back to his seat because of anticipated danger.

USING RUNNING-  
BOARD OF CAR IS  
NOT NEGLIGENCE

But it is also said that the plaintiff would have seen the bins had he looked ahead for them, and that he was negligent in not doing so. But he was not negligent in failing to look ahead, unless he had reason to anticipate some such danger; and if we are correct in what we have already said, he had no such reason. He had a right to assume that the defendant would perform its duty in guarding the safety of its passengers and servants; and it was only because it had failed to do so in this instance that the danger was encountered. The plaintiff had had no warning, except to look out a little for the switch, until the bins were so near that it was impossible to avoid striking them; and why should he have looked for dangers whose existence he could not have anticipated? It is not claimed that the caution in respect to the switch was a caution against striking against it; more likely it referred to a jolting motion in passing it.

The cases of *Hickey v. Boston, etc., R. R. Co.*, 14 Allen, 429, and *Camden, etc., R. R. Co. v. Hoosey*, 99 Penn. St. 492; s. c., 6 Am. & Eng. R. R. Cas. 454, upon which the defendant has greatly relied, we do not think are necessarily inconsistent with these views.

We decide this case upon its peculiar facts, and we are of opinion that the facts presented a case for the jury. We also think that the instruction given to the jury were unexceptionable.

The judgment will therefore be affirmed.

The other Justices concurred.

## TEXAS AND PACIFIC R. R. Co.

v.

HARDIN.

(62 Texas, 367.)

A statement that a party has made an effort to get the depositions of certain witnesses, by making out interrogatories, having them crossed by opposing counsel, who have agreed to waive commissions and consented that the depositions might be taken before any officer legally qualified, is not stating that due diligence contemplated by the law.

An application for continuance, showing that the means given by law to procure testimony has not been used, is addressed to the discretion of the trial judge, and, in the absence of some abuse of that discretion, this court will not reverse a judgment because of a failure of the lower court to grant a continuance.

Such application should clearly and fully set out the grounds for a continuance, as to whom the interrogatories were sent, the substance of the material testimony not obtainable then, the efforts to ascertain the whereabouts of witnesses, that their evidence will be at hand at the next term of the court, and other like facts explaining fully the various things done constituting diligence.

A bill of exceptions to the action of the court below in overruling a motion for continuance should fully state the grounds upon which its action was based.

Where the court charged the jury as to whether an injury resulted to a passenger from defective cross-ties or rails, and also explained what character of defects would impose liability on the company, an instruction to the effect that, if the jury should find that such defects did in fact exist, which were known or might have been known to the company, they should find for plaintiff, if his injuries resulted therefrom, was not error, and is not a charge upon the weight of evidence.

See opinion for a statement of diligence in procuring absent testimony, which the court below might well have regarded as insufficient.

APPEAL from Kaufman. Tried below before the Hon. Green J. Clark.

On March 28, 1884, plaintiff (appellee) filed his petition in the Kaufman district court, and therein alleged in substance that on January 15, 1884, he and his wife, S. E. Hardin, took passage on one of defendant's trains at Terrell to go to some point west on defendant's line; that about 3 o'clock in the morning, in Parker county, the train met with an accident and was derailed, whereby plaintiff was seriously injured; that the accident was due to the defective condition of the track, and to the negligence and unskillfulness of the men in charge of the train; that by reason thereof, plaintiff's left arm was broken and lacerated in two places, between the wrist and elbow; his little finger of right hand broken; his left knee hurt and bruised, and his head and face cut, gashed, and

greatly disfigured, and his left eye cut and punched; that the injuries are permanent, and will give him continuous physical and mental pain and anguish, and impair his ability to labor, etc.

On the same day plaintiff, joined by his wife, S. E. Hardin, filed their joint petition in the district court against defendant to recover damages for personal injuries received by the wife in the wreck, and therein alleged in substance that the wreck was due to the condition of the roadbed and the negligence and unskilfulness of the servants in charge of the train, whereby the wife sustained serious and permanent injury to her spine and hips, producing paralysis.

On May 15, 1884, defendant filed its answer to these petitions, and, after pleading the general denial, pleaded specially, in substance, that the action in question resulted from the breaking of an iron rail through a latent flaw therein, which could not have been detected by the exercise of the utmost care and diligence usually and properly used in the inspection of railroads; and that if plaintiff's injuries should prove permanent, it would be in consequence of his neglect in caring for the same.

On June 24th, on motion of defendant, both suits were consolidated, and plaintiff amended his petition, and, leaving out his wife, prayed for damages he had sustained by reason of the personal injuries to his wife. On June 25th, the cause was called for trial, the plaintiff announced ready, but the defendant was not ready and filed its application for continuance on the ground that twelve material witnesses were absent. This application was overruled, the defendant saving an exception thereto. The cause proceeded, and verdict in plaintiff's favor for \$17,500, viz., \$10,000 personal injuries received by plaintiff, \$7500 by his wife; upon which the judgment appealed from was rendered.

*Tooke & Henry* for appellant.

*Manion & Adams* and *Word & Charlton* for appellee.

STAYTON, J.—Application for a continuance was based on the absence of the testimony of certain witnesses who were named; and it shows that the appellant had made an effort to get their depositions by making out interrogatories and sending them to counsel for appellee, who promptly crossed them, and made an agreement waiving commissions and consenting that the depositions might be taken by any officer authorized to take depositions.

CONTINUANCE—  
DUE DILIGENCE  
IN GETTING TESTIMONY.

This was not the use of such means as the law furnishes to procure testimony. Arts. 2219, 2225, 2227, 2228, R. S., provide a means by which witnesses may be compelled to give their testimony by deposition, and one who fails to use such means cannot be said to have used due diligence. *McMahan v. Busby*, 29 Tex. 194; *Hensley v. Lytle*, 5 Tex. 499.

An application which shows that the means given by the law to

procure testimony have not been used is addressed to the discretion of the trial court, and unless it clearly appears that such discretion, which is not an arbitrary one, has been abused, this court will not reverse a judgment because the court below overruled a motion for a continuance.

The application states that the interrogatories and agreement to take the depositions of the witnesses Bixler, Castello, Gibson, Armstrong, Williams, and Dillon were sent to a responsible and reliable person in Howard county, Texas, where those witnesses were said to live, that they might be taken by an authorized officer. There is no statement that the interrogatories were ever delivered to any officer authorized to take the depositions, or that any step was taken in reference thereto by the person to whom the interrogatories and agreement were sent. It is not shown that the evidence of the witnesses would have tended to prove any of the defences set up in the answer, further than is so shown by the general averment that their testimony is material; nor is it shown that the appellant expected to have their testimony at the next term of the court.

It is not shown that the witnesses actually resided in Howard county, nor that they lived there when the interrogatories and agreement were forwarded and had since removed, and that thereby the appellant had been unable to ascertain their residences and procure their testimony. Such facts should have been shown in an application addressed to the discretion of the court. *Trammell v. Pilgrim*, 20 Tex. 160; *McMahan v. Busby*, 29 Tex. 193; *Baldessore v. Stephanes*, 27 Tex. 455; *Byne v. Jackson*, 25 Tex. 96; *Townsend v. State*, 41 Tex. 135; *Chilson v. Reeves*, 29 Tex. 279.

The interrogatories to the witnesses Jackson and Allen, with the agreement to take their depositions without commission, were sent to the clerk of the district court for Tarrant county, where the witnesses resided, on or about May 3, 1884; and the application states that soon after the clerk received the interrogatories and agreement, he notified appellant's counsel that Allen had gone to Sedalia, Missouri, but promised to take the deposition of Jackson.

The statement as to what occurred in reference to getting the testimony of Jackson after the papers went into the hands of the clerk, as made in the application, is correctly set out in brief of counsel for appellant as follows:

"That the said Hartsfield, district clerk, as aforesaid, advised defendant's said attorneys that he would take the depositions of the said Dr. Jackson as soon as he returned to the city of Fort Worth, which he thought and understood would be about June 1, 1884, and defendant's attorneys wrote him to take the same as soon as Jackson returned. That on or about June 18, 1884, defendant's attorneys, learning that the depositions of the said Jackson had not been taken, wired him to come to Dallas and see them in respect thereto. That said Jackson obeyed said message and went to Dal-

las, and, by defendant's attorneys' advice, went on to Terrell to visit plaintiff and examine his arm, hand, and injuries. That said Jackson and Allen, as physicians and surgeons, had treated plaintiff and his wife for said injuries immediately after they were sustained, and for some time thereafter. That defendant's attorneys notified said Jackson that this cause was set for trial on the 24th day of this month, and instructed and requested him to attend in person as a witness for defendant herein, and said Jackson promised so to do. That on the evening of Saturday, June 21, 1884, defendant's said attorneys, in order that said Jackson might not fail to attend as such witness on the trial of this cause, sent him another telegraphic despatch to be present on June 24, 1884, the day this cause was set for trial. That in obedience to said despatch, said Jackson, on yesterday, the 24th of June, came as far as Terrell with the view of attending this court as a witness in this cause. From that point he notified defendant's claim agent, J. T. Brown, that he was sick, suffering from dysentery. Defendant's said agent, Brown, then notified him to come here to-day so as to be present at the trial hereof, but thereafter said Brown was notified by telephone that said Jackson had grown worse with his said ailment and had returned to Fort Worth for medical treatment."

On this state of facts the court below may have held that the appellant relied on having the witness present at the trial, and, therefore, did not use such diligence to get his deposition as it might have used. If so, we cannot say that such ruling, under the facts, was erroneous.

If the clerk of the district court for Tarrant county had been clothed with such powers as the articles of the statute before referred to would have given to him, had the statutory method of taking depositions been pursued, it may be, and is most likely, true, that the deposition of the witness would have been taken.

The witness Jackson is shown to have been in charge of the appellant's hospital at Fort Worth, and over him the appellant seems to have exercised such control as enabled it to call him to Dallas, to send him to Terrell, and, but for his indisposition, to have secured his attendance on the trial; and the court below may have held that the exercise of such control as the appellant had over the witness would have enabled it to get his deposition. The appellant knew that his deposition had not been taken on June 18th; that the cause had been set for trial on the 24th; yet no effort seems to have been made between these dates to get his deposition.

After appellant's counsel were notified that the witness Allen had gone to Sedalia, Missouri, other interrogatories were made out to him, and as early as May 12, 1884, these were crossed by counsel for appellee, and an agreement made that the depositions of the witness might be taken without commission by any qualified officer. These were at once sent to Sedalia, Missouri, to have the deposition

of the witness taken. To whom these papers were sent does not appear; that any further step was taken to procure his testimony does not appear; and, besides, the application was wanting in these matters referred to, in connection with the effort to get the testimony of witnesses from Howard county.

Interrogatories and agreement to take without commission the depositions of the witnesses Foule and Bogert were sent to the clerk of the district court for Tarrant county, May 3, 1884. These were received by the clerk, who promised to take the depositions of the witnesses as soon as he could do so, but he afterwards informed counsel for appellant that he was unable to find the witnesses, but would endeavor to do so; whereupon counsel for appellant more than once, by letter, requested him to take the depositions if he could. The application nowhere stated that the witnesses resided in Tarrant county, but only that counsel, at the time the interrogatories were made out, heard reports that they there resided. When notified that they could not be found, may it not have been the duty of the appellant to make some inquiry as to the whereabouts of the witnesses? Was a request to the clerk to continue his search enough? The court below may have thought not; and if so, we are not prepared to say that this was wrong. The application is also wanting in statements heretofore referred to.

Interrogatories and agreement to take depositions without commission were sent to Parker county and were placed in the hands of a proper officer, who took and returned the depositions of five of the witnesses named, and their evidence was used on the trial, but the officer made known the fact that he did not take the answers of the other two because they had left.

When the depositions taken were filed does not appear; but it does appear that on 30th May, 1884, the cause was set for trial on the fifth day of the first week of the court, and that, on a jury being demanded by the appellee, the cause on the same day was reset for the second day of the fifth week of the court. It is not shown that any effort was made to ascertain where the witnesses were, after the depositions of the others were returned, and the court below may have thought that by the exercise of proper diligence that fact might have been ascertained and their testimony obtained in time for the trial. The application, in so far as based on the want of the testimony of these two witnesses, is also defective in matters heretofore referred to.

The bill of exceptions, taken to the action of the court in overruling the motion for a continuance, does not in any respect inform us of the grounds on which the action of the court below was based; which is the leading object and purpose of a bill of exceptions in such case, and we might decline to examine an assignment based on an order overruling a motion for a continuance, when no proper bill of exceptions is found in the record. *McMahan v.*



Busby, 29 Tex. 195; Harrison v. Cotton, 25 Tex. 54; Campion v. Angier, 16 Tex. 93.

We have, however, carefully examined the application for a continuance, and, although not set out in the bill of exceptions, there are many reasons why the court did not err in refusing the continuance, some of which we have pointed out.

The jury was carefully instructed as to the state of facts which would authorize a verdict for the appellee, and also as to what character of defects in its road would relieve the appellant from liability.

The appellant pleaded that the defect which caused the car to leave the track was a latent defect in a rail which could not have been discovered by the exercise of a high degree of care, and that it was unknown.

LATENT DEFECT  
IN RAIL OR CROSS-  
TIES.

The evidence was conflicting, but there was evidence tending to show that the injury did not result from any latent defect in a rail, but that it resulted from the general bad condition of the road, including, among other things, bad iron and rotten ties. There was testimony, however, tending to show that the rail was apparently sound but internally defective, and that the cross-ties were apparently sound.

In this state of facts, and with instructions in effect as before stated, in connection with the rest of the charge the following charge was given:

"If the injuries were caused by some latent defect in the road or in the ties, which was unknown to the defendant, its agents or employees, and which could not be known or discovered by the use of reasonable and careful observation, care, and diligence such as a prudent person should exercise under like circumstances, the jury should find for the defendant. But if the defect in the rail and in the cross-ties caused the injuries, and that was known to exist to the defendant, its agents or employees, or could have been known and discovered by the use of reasonable and careful observation and diligence such as a prudent person, having a due regard for the rights and safety of others, should exercise in like circumstances, the jury should find for the plaintiff."

It is insisted that this was a charge on the weight of evidence, or rather that the charge assumed that there was a defect in the cross-ties.

We do not think that this part of the charge could have been understood by the jury to indicate that in the opinion of the court there was a defect either in the rail or cross-ties, and especially so if the whole charge be considered.

The court had already submitted to the jury whether the injury resulted from defective cross-ties or rail, and had explained what character of defects in either would impose on the appellant liability or relieve it therefrom, and in the charge given could not have

been understood to have meant more than that, if the jury found from the evidence that the defects before spoken of in the charge really existed, then they would find for the plaintiff if they believed the injury resulted from defects which were known to the appellant, or which might have been known by the exercise of proper care. Both clauses in this charge left the question of defect, or not, to the jury.

There was no error in the refusal of the court below to give the second charge asked by the appellant, to the effect, if the jury found that the disabled condition of the appellee's arm was due to his own inattention, they might take this into consideration in estimating the damage.

This would have been proper if there had been evidence showing inattention on the part of appellee, but we find no such evidence in the record; hence, the court correctly refused the charge.

When there are no facts on which to base an inquiry, a charge which would raise the inquiry would be misleading.

The testimony of Drs. Jackson and Allen may have been important to the appellant, but the requisite diligence was not used to procure their testimony, and it does not appear in the application for a new trial or elsewhere what their testimony would have been if present.

The verdict and judgment are large, but the injuries received by the appellee and his wife were of a serious character; and there is much in the record evidencing that the verdict was the honest, deliberate finding of the jury on the facts before them. In such case, to set aside their verdict, which the court below has refused to do, would be the exercise of a power which this court has never felt authorized to assume, except in those cases in which it was clear that the verdict was not reasonably well sustained by the facts proved.

The judgment is affirmed.

Affirmed.

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BEDFORD, SPRINGVILLE, OWENSBURG AND BLOOMFIELD R. R. Co.

v.

RAINBOLT.

(99 *Indiana*, 551.)

In a suit against a railroad company for injury resulting from its negligence, an express averment that the plaintiff was guilty of no contributory negligence is not necessary if that fact otherwise appears, *e.g.*, as where it is averred that while the plaintiff, being a passenger, was seated in the defend-

ant's coach, the coach, by reason of the defendant's negligence, broke through a bridge, whereby, etc.

Proof that a railroad passenger was injured by the train breaking through a bridge raised a presumption of negligence by the carrier, which may be rebutted by proof. The slightest negligence in such case imposes liability, the care required being the greatest that is practicable in keeping the machinery and bridges in safe condition, consistent with what are the known means of attaining that end.

In the absence of proof that the safety of a properly constructed railroad bridge may depend upon the soundness of a single iron rod, the jury should not be instructed that if the bridge broke down because of a defect in such single rod, which was not discoverable, and the injury resulted therefrom, there could be no recovery.

Where the general verdict is in proper form, a failure of the jury to answer interrogatories does not authorize a *venire de novo*.

Evidence which controverts that of the defendant as to particular facts is proper in rebuttal, though the same evidence would also have been proper as part of the plaintiff's original case.

FROM the Owen Circuit Court.

*M. F. Dunn, G. G. Dunn, A. G. Cavins, and E. H. C. Cavins* for appellant.

*E. E. Rose and E. Short* for appellee.

MITCHELL, J.—Solomon Rainbolt, on the 8th day of November, 1881, became a passenger on one of the trains of the FACTA. Bedford, Springville, Owensburg & Bloomfield R. R. Co., to be carried from Switz City to Bedford.

While being thus carried, the car in which he was seated, together with the train by which he was proceeding, was precipitated into White River while passing over an iron or combination bridge built or used by the company. He sustained severe, and it is claimed permanent, injuries by the fall, and from being involved in the wreck of the train in the river.

His complaint for damages is in three paragraphs, which are in no material respect different from each other.

Preceded by the formal averments, the default of the railroad company is averred in the first paragraph, as follows: "That by the carelessness, negligence, and default of its agents and employees, and for want of due care and attention to its duty in that behalf, the said cars broke through the railroad bridge across White River." And in the second as follows: "That by the carelessness, negligence, and default of its agents, servants, and employees, and for want of due care and attention to its duty in that behalf, the locomotive and cars were run upon and through the railroad bridge," etc. And in the third as follows: "That said defendant did, by its servants, agents, and employees, carelessly and negligently conduct the running of said cars, and was so in default in the care and oversight of said railroad and bridges thereon; that said cars were run upon the railroad bridge over and across White River, said bridge being,

as defendants knew, insecure, and were thereby thrown into White River." Each paragraph concluded with an averment of the injuries sustained and a claim for damages.

The trial resulted in a verdict and judgment, over a motion for a new trial, for the plaintiff, from which judgment the appellant prosecutes this appeal.

The argument of appellant's counsel embraces four points:

1. That the complaint is not sufficient, for failing to show, either by direct averment or by its statement of facts, that the appellee was himself without fault. For this alleged error, it is contended, the motion in arrest of judgment should have been sustained, there having been no demurrer to the complaint.

2. That by reason of the failure of the jury to make direct answers to some of the interrogatories propounded, a *venire de novo* should have been awarded,

3. That the court erred in giving, and refusing to give, certain instructions to the jury. A summary of those given and complained of, and those refused, will be found farther on.

4. That certain testimony admitted on behalf of the appellees as rebutting evidence was incompetent.

Concerning the first point, we have to say that while it is, and ought to be, the rule that in actions for damages growing out of the alleged negligence of another, it must always be made to appear from the complaint, either by direct averment or by the statement of the facts and circumstances under which the injury occurred, that the plaintiff was without contributory fault or negligence, we are of the opinion that the complaint in this case is, nevertheless, sufficient within that rule.

The averment that the injury occurred in a given case without the fault or negligence of the plaintiff is not always controlling; nor is the absence of such averment in every case to be taken as a failure to aver due care.

Taking all the allegations of a complaint together, and notwithstanding the formal negative averment, the presumption of contributory negligence may appear, as in the cases of *President, etc., v. Dusonchett*, 2 Ind. 586; *Riest v. City of Goshen*, 42 Ind. 339, and other cases; or conversely, as in *Duffy v. Howard*, 77 Ind. 182, and cases there cited.

From the averments in the complaint, in this case, it must be taken that the appellee was lawfully a passenger on the appellant's train of cars, presumably submitting to its rules and regulations as such. The giving-way of the railroad bridge over which the train was passing precipitated him violently into the river below, inflicting upon him the injuries complained of; and it must be held, from the situation in which the appellee is shown to have been, the relation which he occupied toward the railroad company, which

CONTRIBUTORY  
NEGLECTANCE  
MUST BE NEGAT-  
IVED.

relation placed him under no duty except to remain passive in its hands while being carried, that all presumption of negligence on his part is rebutted by the averments of the complaint. *Mitchell v. Robinson*, 80 Ind. 281; *Michigan Southern, etc., R. R. Co. v. Lantz*, 29 Ind. 528.

It is suggested in the argument that it does not appear but that he may have conducted himself negligently after the bridge went down, in the endeavor to extricate himself from the wreck, etc.; but we are not disposed to hold that a passenger who without fault becomes involved in a disaster of the apparent magnitude of that here described should be required to aver or prove that he acted with prudence and deliberation while so involved. The court committed no error in overruling appellant's motion in arrest.

Was it error to overrule the appellant's motion for a *venire de novo* as contended in counsel's second point? If the question was properly raised in the record, the answer to it would depend upon whether the interrogatories, the answers to which are complained of, were pertinent and direct, and whether such answers are uncertain, indefinite, or evasive.

The question of the sufficiency of the answers to the interrogatories is not properly raised by a motion for a *venire de novo*. A *venire de novo* can only properly be awarded where the verdict of the jury is so imperfect that a judgment cannot be rendered thereon.

The general verdict, however, when in proper form, covers all the issues in a given case, and it cannot be said, because an answer to an interrogatory returned with a general verdict, properly framed, is indefinite, uncertain or ambiguous, that, therefore, there is either a failure to find on all the issues, or that there is an ambiguity in the finding or verdict of the jury. Until overthrown by a special finding, absolutely inconsistent with it, the general verdict stands, and the judgment which follows is supported by it, and does not in any manner depend for support on the special interrogatories. By failing to observe the distinction between a special verdict or special finding of facts, and answers to interrogatories propounded to the jury, some of the cases have held that the failure of the jury to make certain and definite answers to interrogatories may be a cause for a *venire de novo*, but the proper way of saving the question in such case is indicated in *West v. Cavins*, 74 Ind. 265; *McElfresh v. Guard*, 32 Ind. 408; and *Ogle v. Dill*, 61 Ind. 438. These cases hold that a failure of the jury to make definite answers to interrogatories, where there is a general verdict returned, is not proper ground for a *venire de novo*, and what is said in *Peters v. Lane*, 55 Ind. 391, and *Carpenter v. Galloway*, 73 Ind. 418, indicating a different rule, may be regarded as modified by the later cases.

We have examined the questions propounded to the jury, and

their answers, and while some of them are not answered directly, we are, nevertheless, of the opinion, considering the character and construction of the questions, that the answers cannot be said to be improper. For the reasons mentioned, there was no error in the ruling of the court in overruling the motion for a *venire de novo*.

The next point argued is that the court erred in giving, of its own motion, instructions numbered 8, 9, 11, and 12, and in refusing to give the appellant's instructions prayed for, numbered 4, 5, and 7. That we may not extend this opinion beyond bounds, we give only the substance of the instructions complained of, which were given by the court, embracing all that is material to present the questions raised:

In the eighth instruction the jury were told, in substance, that if they should find from the evidence that the plaintiff was injured by an accident arising from a defect in the road or bridge of said company, without any fault on his part, the legal presumption is that the injuries of the plaintiff were caused by the negligence of the defendant, and that this presumption might be overthrown by proof that the injuries complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide.

And in the ninth the jury were told, in substance, that while a carrier does not, in legal contemplation, warrant the absolute safety of passengers, it is yet bound to the exercise of the utmost diligence and care, and that the slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render it liable to answer in damages; and that the law imposed upon a common carrier the duty of providing strong and sufficient carriages or cars for the journey, and good and sufficient track, culverts, and bridges for said carriages or cars to pass over, and to provide conductors and other agents, whose duty it is to use every precaution against danger, and that it was bound to take notice of the manner in which its road and the bridges are constructed, and the plan and size thereof, and whether they are of such size and built on such plans as are required for the safety of their passengers. It also contained, substantially, the same instruction as to the presumption of negligence and burden of proof as the eighth.

The eleventh and twelfth instructions were as follows:

"11th. If you find from the evidence that the accident was occasioned by a condition of things which the company could neither foresee nor provide against, then you should find for the defendant.

"12th. If you find from the evidence that the immediate cause of the alleged disaster was the want of the proper construction of said bridge over White River, either as to size, material, piers, or

the adjustment thereof, then you should find for the plaintiff, unless you should further find that the size and construction of said bridge were right and proper for the use intended, and that the material in said bridge had been properly tested, by tests known to men skilled in such material, or could not be so tested and preserve the strength of said material, and said disaster was caused by a defect in said material which could neither be foreseen nor provided against by human foresight and care, then you should find for the defendant."

The objections which appellant's counsel urge against the foregoing instructions may be comprehended under the following summary:

*First*—That in laying it down as the law of the case, that if the accident and injury complained of were proved, a legal presumption arose that the railroad company was guilty of such negligence as cast upon it the burden of proving that the disaster occurred without any degree of negligence on its part; and,

*Second*—That in instructing the jury that the slightest neglect on the part of the railroad company against which human prudence and foresight might have guarded, resulting in the disaster and injury complained of, rendered the company liable, and that it could only be excused from liability by showing that the disaster resulted from a condition of things which could neither be foreseen nor provided against by human foresight and care, the court stated a rule not warranted by the law, and too strict to be reasonably required of a common carrier of passengers.

As respects the burden of proof, we think the instruction of the court was clearly right. The instruction was in all essential particulars the same as that considered in the *case of Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462; s. c., 3 Am. & Eng. R. R. Cas. 457. In that case an instruction directing the jury that where a passenger in a railroad car was, without his fault, injured by the car in which he was riding being thrown from the track, the law will presume negligence on the part of the railroad company, was held to be a correct statement of the law, and the decision is fully sustained by the reasons given and the authorities cited.

Any other rule would, in many cases, leave a passenger who sustained an injury by the defective condition of a railway track or bridge practically without remedy. The contract which the law implies between the carrier and passenger is that the carrier has a safe and sufficient railroad track to the point of the passenger's destination; that its bridges and all the other means provided by it for his carriage are safe, and that all suitable means had been taken beforehand to carry him safely and without hurt to the point indicated. The condition of its cars, track, and bridges, and the precautions which it has taken for their

BURDEN OF PROOF.

DERAILMENT A PRESUMPTION OF NEGLIGENCE.

DUTY OF COMPANY AS TO CARS, TRACKS, AND BRIDGES.

security and the safe transport of the passenger, are peculiarly within its own knowledge, and while, in most cases, it would be a denial to the injured passenger of all remedy to require him to show affirmatively wherein the company had failed, it is deemed a just and reasonable rule that the company should take the burden of showing that it used all proper precautions for the passenger's safety. Philadelphia, etc., R. R. Co. v Anderson, 94 Pa. St. 351; s. c., 6 Am. & Eng. R. R. Cas. 407. Some distinction is sought to be drawn by counsel between a "*prima-facie* presumption" and a "legal presumption," and it is urged that the jury might well have understood, from being told that a legal presumption of negligence arose from the accident and injury, that such presumption was conclusive. We do not think the criticism justified. As used, we can perceive no difference between a *prima-facie* presumption and a legal presumption. In this regard, as well as in respect to the degree of care required of a common carrier towards a passenger, and the condition of things which will exonerate it from liability for an injury occasioned to a passenger resulting from a defective track or bridge, the instructions stated the law to the jury with commendable accuracy and precision.

The rule that there may be degrees in negligence has long ago been discarded in this State, and when it is said that an occurrence came about through the slight negligence or gross negligence of another, it is, in either case, nothing more than saying that such person was negligent; and so when the court told the jury that if the injury was occasioned through the slightest neglect of the railroad company, against which human prudence and foresight might have guarded, it would be held liable, it was equivalent to saying that if the appellant, by the exercise of prudence and foresight, might have discovered the defective condition of its bridge, then the neglect to exercise such prudence and foresight, resulting in injury, would render it liable. The addition of the word "human" to the prudence and foresight required neither added to nor detracted from the degree of care required.

The degree of diligence which the law requires of railroad companies in keeping their track, bridges, culverts, and cars in a safe condition is expressed in a variety of terms in the books; but, after a careful examination of the adjudged cases, we have been able to discover none in which a rule less exacting than that laid down by the court in this case was announced. In the maintenance of its track and bridges in a secure condition, the highest degree of practical diligence and care is required on the grounds of public policy. Considering that vast numbers of human beings are daily committing themselves to the care and fidelity of railroad companies, which for an adequate reward engage to transport them with great speed from point to point, any negligence in the maintenance

RULE AS TO COM-  
PARATIVE NEGLIGENCE DISCARDED.



of their tracks and bridges in such condition of safety as practical skill and sagacity have attained to, and applied generally to the subject, should not be tolerated.

While this rule does not require that common carriers should insure the safety of passengers, nor involve such an imaginary or speculative degree of skill or care as the human mind might conceive of or invent, so as to insure the safety of tracks and structures beyond all peradventure, it does, nevertheless, require that the highest degree of practical care and skill consistent with the known, usual, and approved appliances for that purpose should be used and properly maintained.

A fair consideration of all the instructions given by the court are within this rule, which is approved, among many others, by the following authorities: *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304, and the numerous cases there cited and commented upon; *Toledo, etc., R. R. Co. v. Conroy*, 68 Ill. 560; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225; *Galena, etc., R. R. Co. v. Yarwood*, 15 Ill. 468; 2 *Rorer on Railroads*, 955, 956, 1086, 1088, and authorities there cited.

Most of the instructions which were asked by the appellant and refused by the court were intended to modify the rule of diligence as required in the instructions given by the court, and concerning these nothing need be added to what has already been said on that subject.

The fourth instruction asked by the appellant, and refused by the court, was, in substance:

That if the jury should find from the evidence that the accident was caused by the breaking of any particular rod in the bridge which had in it an original internal defect, and that INTERNAL DEFECTS IN BRIDGE. said rod, being necessary for the support of the bridge, broke, and that the breaking of said rod occasioned the fall of the bridge and train, and if the rod and bridge had had sufficient tests to justify the company in relying upon its safety, and the defect in the rod was not discoverable by reason of its position in the rod, or in the iron shoe or wood in which it was concealed, then the plaintiff could not recover.

We think all that is relevant to the case in the foregoing instruction was comprehended in the instructions given by the court. Part of it relates to the degree of vigilance and care to be exercised by the company in the construction and maintenance of the bridge, which was covered by the instructions given by the court. That part of the instruction which proposes the theory that the bridge may have fallen on account of the breaking of one defective rod is negatived by an answer of the jury to one of the appellant's interrogatories, in which the jury say, in substance, that the fall of the bridge was not caused by the breaking of one single rod. By this

answer it is shown that the failure to give the instruction worked no detriment to the appellant; moreover, as we find no evidence tending to prove that this bridge fell by the breaking of one particular rod, or that any properly constructed railroad bridge would be liable to fall by the breaking of any one particular rod, we are not prepared to say, as a matter of law, that a railroad bridge so constructed as to depend for its safety on the integrity of any one rod would be such a bridge as, in the exercise of the degree of diligence required, a railroad company would be warranted in erecting or continuing in use.

Substantially, this instruction asked the court to say, as a matter of law, that if the fall of the bridge resulted from the breaking of any one rod which had in it an undiscoverable defect, if such rod had been sufficiently tested to justify the company in relying upon it, then it was not responsible.

We find in the record no evidence that a bridge so constructed would be suitable for the important purpose for which this bridge was intended; and if we were obliged to pronounce upon the subject as a matter of law, without evidence to the contrary, we would say that a railroad bridge designed to carry passenger trains over an important river, so constructed as that the giving-way of one single rod would precipitate it, with its train-load of human beings, into the depths below, was not constructed with due care and skill. We do not say that a railroad bridge so constructed would not be sufficient, as a matter of law. It may be that engineering skill, as practically applied to the construction of railroad bridges, has discovered nothing better. What we do say is that until proof is made of this, we cannot say, as the instruction in question seems to propose, that a bridge so constructed and used is sufficient for the purpose it was intended to subserve. We think there was no error in refusing the appellant's instructions.

The last point made by counsel for appellant is that the court committed error in permitting the appellee to introduce evidence in rebuttal showing the condition of the bridge and abutments some time before and at the time of the injury.

As the appellant had introduced evidence as part of its defence tending to show that the abutments and bridge were in proper condition at and shortly before the injury, we think the evidence introduced in rebuttal was competent, and that it was not necessarily a part of plaintiff's original case. It is true, the appellee introduced some evidence as part of his original case tending to show the imperfect and unsafe condition of the bridge, but this did not preclude him from introducing evidence tending to rebut the appellant's evidence on particular points, which tended to show that the bridge and abutments were safe.

We are impressed with the conviction, after reading the evidence in the case, that, considering the extent of the injuries actually suf-

ferred by the appellee, the damages were excessive; but this was a matter peculiarly within the province of the jury, and, as we find no error in the record, the judgment is affirmed.

TEXAS AND ST. LOUIS R. R. Co.

v.

SUGGS.

(62 *Texas Reports*, 323.)

In a suit by a passenger against a railroad company to recover damages for personal injuries, a charge which declares that it is the duty of those operating trains to inspect the same is not erroneous when the damage sustained is alleged to have been caused by negligence of the company in failing to furnish safe cars for travelling purposes.

The fact that the car within a short distance was twice derailed showed *prima-facie* negligence on the part of the carrier in permitting such car to be used for carrying passengers; and in case such evidence was not, in the opinion of the jury, rebutted, a verdict for damages in favor of a person injured thereby should stand.

If physicians disagreed as to the nature of the injuries sustained by plaintiff, this would not be sufficient to set aside the verdict on the ground that the evidence does not show that he suffered any physical injury, when they all agreed as to his physical suffering.

APPEAL from Titus. Tried below before the Hon. B. T. Estes.

I. T. Suggs, the appellee, brought this suit against the Texas & St. Louis R. R. Co., for damages to him caused by the overturning of the passenger car in which he was travelling. He claimed to have been seriously injured; that his head was cut, his body crushed and some of his ribs broken, besides having severe internal injuries. He alleged that he was confined to his bed for two months, and that he was damaged in his not being able to attend to business affairs. He also sued for exemplary damages.

The railway company answered by general demurrer, specially excepted to the claim for exemplary damages, and specially answered by setting up the fact that the accident was inevitable, and caused by no lack of care on the part of the defendant company. Appellee obtained a judgment for \$1250.

*Herndon & Cain* for appellant.

*W. P. McLean* for appellee.

STAYTON, J.—It is urged that the court erred in giving the following charge: "The defendant, in order to provide for the safety of their passengers, are bound to employ competent agents and employees to run their trains and prepare the same, and such agents must exercise constant care and diligence in keeping their trains and roadway in order; and unless

DUTY AS TO EMPLOYING SERVANTS AND INSPECTING TRAINS ETC.

the evidence shows that the agents of defendant having charge of the train upon which the plaintiff was a passenger, and whose duty it was to inspect the same, performed their respective duties and exercised such diligence as a very careful man would exercise in his own affairs, then the defendant would be liable for such actual damages as the evidence shows resulted from the injuries sustained," etc.

Other parts of the charge stated the duties and liabilities of the respective parties very fully and fairly.

The charge complained of is objected to on the ground that it assumes that it was the duty of the persons running the train to inspect it.

If this be true, it certainly gave to the jury a correct rule of law, unless it be true that a carrier of passengers by rail, who causes its cars to be inspected at certain places on its line by persons who are employed for that express purpose, thereby uses all the care which the law imposes on it for the safety of passengers, and relieves those engaged in operating trains from the duty of examining their trains in any respect between regular inspection stations.

It is peculiarly the duty of those operating trains between such points to examine and watch the trains in their charge, that they may detect and repair any defect likely to imperil passengers; and for their failure to do so, in so far as they can by the exercise of a high degree of care, their employers are responsible if damage to a passenger result.

The facts of this case illustrate the wisdom of the rule which exacts such care.

The passenger coach which was off the track from which it is claimed the injury to appellee resulted was inspected at Texarkana, but when it reached the tank at Mt. Pleasant this same car left the track. There seems to have been no regular car-inspector there. That car was again put on the track. The fact that it had left the track would indicate that either the car or track was not in good order, for cars do not ordinarily leave the track if they are; under such circumstances, was it not the duty of those persons in charge of the train to examine and know what caused the derailment? or might they say, "This car was inspected at Texarkana, and thereby my employer has exercised, through another agent, all the care which the law exacts of him."

Such a rule as that contended for by appellant would relieve carriers by rail, practically, from the duty, through proper agents, of exercising, at all times and in all places, that degree of care without which there is no safety to passengers.

It was urged that there was no evidence that the injury of which the appellee complains resulted from any neglect of the railway company, or that either the car or track was defective.

DERAILMENT AS  
EVIDENCE OF DE-  
FECT IN CAR OR  
TRACK.

The evidence shows that the car left the track at the tank at Mt. Pleasant, and that without being in any way repaired it was placed on the track again, and that after running a short distance it was derailed again and turned over.

Afterwards, by another train, it was taken up and taken to Tyler, and when inspected there it was found to be broken; but in reference to these breaks witnesses for appellant gave it as their opinions that they would not affect the safety of the car. They, however, described the injuries, and it was for the jury to pass on their probable effect, under all the evidence. The same witnesses stated that the injuries to the car of which they spoke, and of which they knew nothing except from an inspection of the car after it reached Tyler, occurred when the car left the track. Their statements were matter of opinion, but if it be conceded that their opinions were correct as to the cause of the injuries to the car, then, did the breaks occur when the car left the tank or at time the car was overturned?

The witnesses did not profess to, and in the nature of things, they not being present, could not, testify as to this matter. If the breaks occurred when the car left the track the first time, it was for the jury to determine whether it was negligence to put it on the track again, and also to determine, from the description given by the witnesses of the breaks, whether they were such as were likely to render the car unsafe.

There was also evidence tending to show that after the car left the rails it ran a considerable distance before it turned over. Whether it might, by the exercise of due care, have been stopped before it turned over, and the injury thereby averted, was a matter for the consideration of the jury. The fact that the same car, within a distance of seven or eight miles, had twice left the track was one which the jury might consider, and if, in the opinion of the jury, the evidence offered for the appellant was not sufficient to rebut such evidence of negligence as that fact afforded, then there is no rule of law which would authorize this court to set their finding in this respect aside. *Edgerton v. N. Y. & H. R. R. Co.*, 39 N. Y. 229; *McMahon v. Davidson*, 12 Minn. 358; *Shearman & Redfield on Negligence*, 280.

It is urged that there was no evidence to show that the appellee suffered any serious injury. The evidence of the appellee himself, and of his family, tends to show that he was seriously injured. His attending physician gave it as his opinion that some of the appellee's ribs were fractured, and detailed the facts on which he based his opinion. He also stated that the lungs of his patient were affected by the injury, that he occasionally spit blood, and that he suffered intensely.

Another physician testified to the bruise of the side of the appellee, but was of the opinion that there was no fracture. Other

physicians, from an examination of the appellee, were of the opinion that some of the ribs were fractured, but they disagreed among themselves as to the real cause of the suffering of the appellee, which none of them denied.

There was ample evidence to sustain the verdict in this respect, and that there may have been some conflict furnishes no reason for setting the verdict aside.

The judgment is affirmed.

Affirmed.

**Derailement Evidence of Negligence.**—It is well settled that where a passenger is injured by a train running off the track, the law raises, *prima facie*, a presumption of negligence on the part of the railway company. *Cleveland, etc., R. R. Co. v. Newell*, 8 Am. & Eng. R. R. Cas. 483; *Pittsburg, etc., R. R. Co. v. Williams*, 3 Am. & Eng. R. R. Cas. 457; *George v. St. Louis, etc., R. R. Co.*, 1 Am. & Eng. R. R. Cas. 294; *Carpen v. London, etc., Ry. Co.*, 5 Q. B. 749; *Zemp v. Wilmington, etc., R. R. Co.*, 9 Rich (S. C. L.) 84; *Sullivan v. Philadelphia, etc., R. R. Co.*, 80 Pa. St. 234; *Balto. & Ohio R. R. Co. v. Noell*, 32 Grat. (Va.) 394; *Balto. & Ohio R. R. Co. v. Wightman's Adm'r.*, 29 Grat. (Va.) 431; *Peoria, etc., R. R. Co. v. Reynolds*, 88 Ill. 418; *a. c.*, 21 Am. R. R. Reports, 324; *Stevens v. E. & N. A. Ry.*, 66 Me. 74; *Denver, etc., R. R. Co. v. Woodward*, 4 Colo. 1; *Bird v. G. N. Ry. Co.*, 4 Hurlstone & Norman (Exchq.), 842; *Flannery v. Waterford, etc., Ry. Co.*, 11 Irish Repts. (C. L.) 30; *Little Rock, etc., R. R. Co. v. Miles*, 13 Am. & Eng. R. R. Cas. 10.

**Inspection of Cars.**—A railroad company is under obligation to exercise reasonable care and diligence in furnishing and maintaining safe and fit cars for trains on its road. Within the scope of this duty it is bound to use reasonable care in the employment of careful and competent inspectors of cars, and the means of repairing defects of in those to be used in its trains. *Little Miami R. R. Co. v. Fitzpatrick*, 17 Am. & Eng. R. R. Cas. 578. Where such inspection has been properly made and the car-wheels thoroughly tested within reasonable time by skilful men, the company is not liable. *Toledo, etc., R. R. Co. v. Beggs*, 85 Ill. 80; *Readhead v. Midland Ry. Co.*, L. R., 2 Q. B. 412. But see dissenting opinion by Blackburn, J. *Ib.*, L. R., 4 Q. B. 379.

A carrier owes the same duty to passengers as to inspection, etc., of cars received from another railroad company and run over its own line by it as it owes them in respect to its own cars. *Richardson v. Gt. Eastern Ry. Co.*, L. R., 10 C. P. 486.

## PITTSBURGH, CINCINNATI AND ST. LOUIS R. R. Co.

v.

SPENCER *et al.*

(98 *Indiana Reports*, 186.)

A complaint by a passenger of a railroad company against a different railroad company, for an injury resulting from a collision at a crossing caused by the careless backing of a train of the latter into the car occupied by the plaintiff is good without averring that the company carrying the plaintiff was without fault.

In such case the passenger is entitled to recover damages, even though the company that has undertaken to carry him has been guilty of negligence.

In such case a special verdict which finds that the injury resulted from the fact that the defendant backed a car against the car occupied by the defendant, whereby the latter car was upset and the plaintiff injured, "by the carelessness, negligence, and fault of the defendant," without finding any facts from which the court can deduce negligence as a conclusion of law, is bad, and a *venire de novo* should be awarded.

Where the facts and inferences therefrom are not disputed, the question of negligence is one of law; but where the facts are disputed, the question is one of mixed law and fact, to be submitted to the jury under instructions from the court.

A special verdict should find facts only, and not conclusions of law, and then the court applies the law thereto.

FROM the White Circuit Court.

*N. O. Ross* and *G. E. Ross* for appellant.

*R. Gregory* for appellees.

ELLIOTT, C. J.—The complaint seeks the recovery of damages for injuries received by Lilla E. Spencer.

The only objection urged to the complaint which is not founded upon a misconception of its language is that it is bad, because there is no allegation that the negligence of the LIABILITY OF COMPANY CAUSING COLLISION. railroad company on whose train Mrs. Spencer was a passenger did not contribute to the injury, and this objection is not well founded. A passenger who is himself without fault is entitled to recover for injuries inflicted through the negligence of another railroad company in running into the train of the company that has undertaken to carry him, even though the latter company has been guilty of negligence. The authorities are full and satisfactory upon this point. *Town of Albion v. Hetrick*, 90 Ind. 545; *Robinson v. New York Central, etc.*, R. R. Co., 66 N. Y. 11; *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628; *Wylde v. Northern R. R. Co.*, 53 N. Y. 156; *Bennett v. New Jersey, etc., Co.*, 7 Vroom, 225; *Danville, etc., Co. v. Stewart*, 2 Met. (Ky.) 119; *Steamer New Philadelphia*, 1 Black, 62; *Thompson, Carriers*, 284.

The verdict in this case was a special one, and all that is stated in it upon the subject of the appellant's negligence is contained in the specification which reads thus: "We, the jury, find that on the 10th day of December, 1881, Lilla E. Spencer was a passenger on a train of the Indianapolis & Chicago Air Line R. R. Co., and that the road of said company passes through White County, Indiana, and crosses the railroad track of the Pittsburgh, Cincinnati & St. Louis R. R. Co., the defendant herein, at right angles, in the town of Monticello; that while said Air Line train was passing over and across said crossing the train of said Pittsburgh, Cincinnati & St. Louis R. R. Co. backed down upon the car in which said Lilla E. Spencer was sitting as a passenger, and upset

said car, injuring her; that there was no fault on the part of Lilla E. Spencer, nor on the part of the Indianapolis & Chicago Air Line Co., but that said car of the Air Line Co. was upset, and the injuries to said Lilla E. Spencer caused by the carelessness, negligence, and fault of the defendant."

"The design of a special verdict," said the court in *Goldsby v. Robertson*, 1 Blackf. 246, "is to exhibit the facts of the case in such a manner that the court can decide according to law, and relieve the jury from the necessity of deciding legal questions on which they may have doubts." In a text-book of excellent standing it is said: "A special verdict which does not find the material facts in detail cannot be supported as such; it must be set aside, and a new trial awarded." 3 *Graham & Waterman, New Trials*, 1418. There are many cases in our reports sustaining this doctrine. *Dixon v. Duke*, 85 Ind. 434; *Vinton v. Baldwin*, 95 Ind. 433. The code declares that "a special verdict is that by which the jury find the facts only, leaving judgment thereon to the court." Sec. 545 R. S. 1881. Facts only are to be found, and not matters of law. All the facts essential to a recovery must be found, and mere conclusions of law are disregarded. *Dixon v. Duke, supra*; 2 *Tidd Pr.* 897, auth. n.

The question in this case is whether the special verdict does find the facts so that the court can declare the law, for if it does not it is bad. The facts, so far as the controlling issue of negligence or no negligence is concerned, and the only facts, stated in the verdict, are, that the train of the appellant was backed down upon the car of the Air Line Co., and that the car was passing over the crossing of the two roads. If it can be decided as matter of law that the bare fact of backing into another train constitutes negligence, then the verdict may be sustained, but we are satisfied that this cannot be held. It may be perfectly proper to back a train, and from that fact alone negligence cannot be declared to exist as matter of law. Nor from the fact that a collision occurred can negligence be adjudged to exist, for a collision may occur through the tort of a stranger, through unavoidable accident, or from some cause for which the carrier is not answerable. One whose right to a recovery depends on negligence must secure a special verdict stating facts which the court in pronouncing the law can declare to constitute negligence. The jury have nothing at all to do with the law in cases where they return a special verdict, but they must state the facts so fully that the court can, in a case like this, declare that the law is that such facts constitute actionable negligence. It is not sufficient to state facts not in themselves constituting negligence, and then by an epithet or conclusion of law characterize them as negligent, but the facts must be so stated as to afford the court grounds for adjudging that the law is that they do constitute negligence. Suppose that an action

SPECIAL VERDICT  
DISCUSSED.

BACKING INTO  
ANOTHER TRAIN  
IS NOT NEGLIGENCE  
PER SE.



is brought for injuries received by a collision on a highway crossing, would a verdict be good which simply found that the railway train backed into the wagon? Or, suppose the collision to be between two wagons at the crossing of two highways, would it be sufficient to find that the defendant backed into the plaintiff's wagon? Again, suppose the verdict in a case against a municipal corporation to find that there was an excavation in a public street, would that finding be enough to authorize the court to declare as matter of law that there was negligence? It seems quite clear that in all these cases the verdict would be insufficient, and in principle they are the same as the case in hand. Upon principle and authority no special verdict can be good in a case where negligence is the material issue, without stating such facts as in law constitute negligence.

Conclusions of law in a special verdict are without force, and a general statement that an act was negligently done is but a conclusion of law. The facts showing how the act was done are essential, for without them the court cannot ascertain or pronounce the law. All the authorities agree that the law is exclusively for the court in cases where special verdicts are returned, but if it be held that a general statement of negligence is good, then nothing at all is left to the court, for the jury have determined both the law and the facts. To allow this would be to permit the jury to usurp the functions of the court and decide the whole case. In that event the court would be without power and without functions, and this surely cannot be the law. If the jury's decision, stated in general terms, that an act is negligent, is sufficient, then what need for a court? All that would be necessary, if that were the law, would be to take a special verdict embodying the jury's opinion. Something is to be done by the court in every case of a special verdict, and that something is to declare the law upon the facts found; but if we hold that the jury's general statement that an act was negligent is sufficient, we affirm the converse of this, because, by so holding, we declare that the verdict of the jury settles everything, the law as well as the facts, leaving the court nothing to do except make the mere formal entry of judgment.

We understand it to be a fixed principle that the court does rule upon all questions of negligence. If it were otherwise there would be no element of law in such a case; everything would be pure matter of fact, nothing would be matter of law. It would be strange indeed if in any case a judgment could be had without the application of rules of law, and in all civil cases the law comes from the court. It has been said scores and scores of times that negligence is generally a mixed question of law and fact, and it has also been often said that where the facts are undisputed, and the inferences to be drawn from them unequivocal, it

may be a question of law. *Gagg v. Vetter*, 41 Ind. 223, *vide* authorities p. 254; *Bellefontaine R. R. Co. v. Hunter*, 33 Ind. 335; Ohio, etc., *R. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554; *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462; *Louisville, etc., R. R. Co. v. Richardson*, 66 Ind. 43; *Binford v. Johnston*, 82 Ind. 426; *Woodruff, etc., Co. v. Diehl*, 84 Ind. 474; s. c., 9 Am. & Eng. R. R. Cas. 294; *Purcell v. English*, 86 Ind. 34; *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Lake Shore, etc., R. R. v. Miller*, 25 Mich. 274. If it be true, as undeniably it is, that the question is always either one of law or one of mixed law and fact, then it must be true that in all cases the court must pronounce the law. In the case of a special verdict it is only possible to do this by acting upon the facts stated in the verdict.

Where a general verdict is sought, the court instructs the jury as to the law of negligence, and thus pronounces the law of the case; but in cases where a special verdict is asked, the law is pronounced, not in instructions to the jury, but upon the facts stated by the jury. If the jury for themselves state the law, then the court is a mere passive spectator, at most a mere moderator. In general verdicts the law enters as a factor, because the jury are required to decide the case "according to the law and the evidence," but in special verdicts they simply state the facts. It is clear that unless all the material facts are stated in the special verdict, the court cannot declare the law, and the result is that the law is not declared at all, or is declared by the jury.

We have said that when the facts are found the legal character and consequences are matters of law for the court, and we now give our authority for this statement. In a recent work it is said: "And though negligence is generally a mixed question of law and of fact, yet when the fact from the existence of which it is claimed that the negligence flows, is found by the jury to be true, then its legal character and the consequences flowing therefrom become a matter of law for the court." 2 *Rorer on Railroads*, 1030. Many cases are cited in support of this proposition, and our own cases lay down this rule.

In the case of *Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335, it was said: "But while negligence is, in general, a mixed issue of law and fact, yet it is equally true that when the fact which it is claimed constitutes negligence is found, its legal character and consequences become a matter of law." In *Woodruff, etc., Co. v. Diehl*, 84 Ind. 474; s. c., 9 Am. & Eng. R. R. Cas. 294, *Howe, J.*, said: "In the case at bar, the facts were very fully found by the court, and the necessary inference therefrom of the appellant's negligence was so plain and certain that the court was authorized, we think, to state such negligence as a conclusion of law."

The question came even more directly before the court in *Toledo, etc., R. R. Co. v. Goddard*, 25 Ind. 185, where the following

WHEN FACTS  
ARE FOUND BY  
JURY, NEGLIGENCE IS A QUESTION FOR COURT.

interrogatories were submitted to the jury and the following answers returned:

“ ‘Was not the defendant guilty of negligence in placing the freight car on the side-track, on the street, thereby obstructing same?’ To which the jury answered ‘yes.’ ”

“ ‘Was not the defendant guilty of negligence in not placing some visible signal at or near the southwest corner of the wood-shed, to indicate the approach of the backing train, to prevent collision?’ To which the jury answered ‘yes.’ ”

The court said: “These interrogatories, we think, should not have been submitted to the jury. The answers to them do not constitute a special verdict under the statute. They were probably intended to be submitted under the last clause of section 336 of the Code, 2 G. & H. 205, which provides that the court, ‘in all cases when requested by either party, shall instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing, which special finding is to be recorded with the verdict. These interrogatories do not conform to the statute. They do not ask the jury to find upon any particular questions of fact; they simply assume that certain facts existed, and ask the jury if they do not constitute negligence.

“The question of negligence is ordinarily a mixed one of law and fact; but when the facts are found, then their legal consequences constitute purely a question of law for the court, and not for the jury. If the jury had been asked to find specially whether the defendant had placed a freight car on the side-track on the street, thereby obstructing the same; and whether the company had placed a visible signal at or near the southwest corner of the wood-shed, to indicate the approach of the backing train, to prevent collision, and the jury had answered the first in the affirmative and the second in the negative, these would have been facts specially found by the jury, and then it would have devolved upon the court to determine, as a question of law, whether the facts so found by the jury constituted such negligence as to make the defendant liable for the injury complained of.”

If we extract from the special verdict the conclusions of law there remains nothing from which it can be concluded as matter of law that there was actionable negligence. There is no fact stated which will authorize the court to make the conclusion which the jury, by usurping the functions of the court, arrived at; on the contrary, the act done, for aught that appears, might have been done without culpable negligence.

It is one of the oldest principles of the law that it is of the very essence of a special verdict that it state all of the material facts, and that the court will supply nothing by intentment. 2 Tidd Pr. 897, auth. n.; *Seward v. Jackson*, 8 Cowen, 406; *Hill v. Covell*, 1 N. Y. 522; *Langley v. Warner*, 3

SPECIAL VERDICT  
MUST STATE ALL  
MATERIAL FACTS.

N. Y. 327; *Eisemann v. Swan*, 6 Bosw. 616; *Hallett v. Jenks*, 1 Caines Cas. 43; *Thayer v. Society, etc.*, 20 Pa. St. 60; *Kuhlman v. Medlinka*, 29 Texas, 385. The code has not changed the rule upon this subject. *Williams v. Willis*, 7 Abbott Pr. 90; *Eisemann v. Swan*, *supra*.

It is important that a special verdict should state the material facts in detail for still another reason than those already stated, and that reason is, that where a special verdict is returned no interrogatories can be propounded to the jury. If, therefore, the party cannot get the facts fully on the record by a special verdict he cannot get them at all, and the result would be a denial of an important right. In the present case there are no more facts in the special verdict than would be implicitly contained in a general verdict, for every general verdict in a case of negligence passes upon and implicitly embodies a decision of that question. If it be true that the general verdict implicitly contains a conclusion on this question, then it must be true that a special verdict which does no more than give expression to that conclusion is in legal effect only a general verdict, and surely no special verdict can be good which, in effect, is nothing more than a general verdict. In a general verdict the jury take the law as declared by the court and apply it to the facts and state their conclusion upon the law and the evidence in a general way; while in a special verdict they consider only the facts, leaving the law wholly and exclusively to the court. If it be said that in a general verdict the jury do not pass upon the law as contained in the instructions of the court, then it must be held, in order to be consistent, that instructing the jury is a meaningless ceremony, and the oath to "find according to the law and the evidence" an empty form.

There may possibly be cases in which it is necessary for the jury to make an inference from the facts characterizing the act as negligence, but that is not the question here. The question here is whether if the act done is in itself not a wrongful or negligent one, it is sufficient by a mere conclusion to characterize it as negligent without stating the manner in which it was performed, or the circumstances surrounding its performance. The naked statement that a train was backed down upon another train standing upon the crossing, without stating how it was done, or under what circumstances it was done, simply informs the court that it was done. This it does and nothing more; and if the act was not in itself negligent, or if there are no facts stated as to the manner of its performance, there is absolutely nothing upon which the court can base a legal conclusion. An act may or may not be negligent; whether it is so or not, in many cases, depends upon the circumstances under which it is done, as is well illustrated by the case of *Pittsburgh, etc., R. R. Co. v. Evans*, 53 Pa. St. 250, where it was said: "Negligence is generally a mixed question of law and

fact, and what renders special verdicts so proper in these railroad cases is, that if they ascertain all the material facts, the undisputed as well as the disputed, the question of negligence then becomes exclusively a question of law, and may be dealt with accordingly." In that case the verdict was held to be insufficient, because, although it stated "that plaintiff passed on to the railroad track, exercising the care that a prudent man would exercise under similar circumstances," it did not state facts enough to enable the court to decide that he was not guilty of contributory negligence. If it were conceded that the jury should characterize an act not leading directly to the inference of negligence as negligent, still it would not conflict with the views here expressed by us, for what we decide is that where an act is not in itself negligent or wrongful, it cannot, as a legal conclusion, be adjudged to constitute negligence where there are no facts stated showing the manner in which it was done, or the circumstances under which it was performed. In our opinion, an act not in itself wrongful or negligent cannot, in the absence of facts or circumstances giving it that character, be declared to constitute actionable negligence.

Judgment reversed, with instructions to sustain appellant's motion for a *venire de novo*.

See Phila. & R. R. Co. v. Boyer, 2 Am. & Eng. R. R. Cas. 180 and note.

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KELLOW, Adm'r,

v.

CENTRAL IOWA R. R. Co.

(Advance Case, Iowa. June 5, 1885.)

Where the trial court has noted on the instructions given that they were excepted to, it will be presumed that the exceptions were taken and noted on the instructions at the time they were given.

The Central Iowa R. R. Co. stopped one of its passenger trains at Mason City Junction, and, for convenience in transferring baggage, the baggage-car was stopped in front of the baggage-room of the depot, so that the rear passenger car was left standing over a cross-track of the Chicago, Milwaukee, & St. Paul R. R. Co.; and in moving certain freight cars out of the way of an engine the employees of the latter road pushed the cars on the cross-track, and some of them, being heavily loaded, broke loose and ran down the grade into the passenger car of the Central, threw it from the track, turned it over, and fatally injured a passenger therein. *Held*, that the Central Co. was guilty of negligence and liable for the injury.

In determining whether a cause of action accrued to a party who was fatally injured by the negligence of another, the test is whether he lived after the injury, and not the length of time he lived thereafter.

On examination of the evidence and findings of the jury, *held*, that the

special finding that the position occupied by the passenger when injured was not shown by the evidence does not preclude a recovery of damages for his death, and the order granting a new trial is affirmed.

APPEAL from Cerro Gordo circuit court.

Plaintiff's intestate was killed while travelling as a passenger on one of defendant's trains, and this action is prosecuted for the recovery of the damages sustained by his estate in consequence of his death. The cause was tried to a jury, who returned a verdict for defendant. Plaintiff filed a motion for a new trial in which he alleged 21 grounds for setting aside the verdict. This motion was sustained as to one of the grounds alleged, and overruled as to all the others. Both parties appeal; defendant's appeal being first perfected.

*H. E. J. Boardman, J. H. Blair and A. C. Daly* for appellant.  
*J. T. Stoneman and H. T. Reed* for appellee.

REED, J.—The accident in which decedent lost his life occurred at Mason City Junction between 9 and 10 o'clock on the evening of the twenty-first of June, 1881. Defendant's railroad runs north and south, and at the place where the accident occurred it crosses the main line of the Chicago, Milwaukee & St. Paul R. R. This latter company has a yard situated about one-half mile west of the crossing, and a branch road operated by it and known as the "Austin branch," runs in a northeasterly direction from this yard, crossing defendant's track some distance north of the point where it crosses the main line of the other road. On the east side of defendant's road there is a track called the "Transfer Track," which is used in transferring cars from one road to the other. This track connects with defendant's road at a point about 80 feet north of the crossing, and with the track of the Austin branch some distance northeast of the point where it crosses defendant's road.

The companies used a common depot, which is situated in the angle west of defendant's track and north of the main line of the other road. The train in which plaintiff's intestate was travelling came from the south. When it approached the station it was stopped at a point about 500 feet south of the crossing. There was no train due at that hour on the other road, and none was within sight or hearing of defendant's trainmen at the time. The three rear cars of defendant's train were to be transferred to the Chicago, Milwaukee & St. Paul Co. to be taken by it to St. Paul, Minnesota, on the Austin Branch. When the train moved up to the station it was stopped when the baggage-car arrived opposite the door of the baggage-room. This brought the front platform of the rear passenger car immediately over the crossing. Decedent entered the train at Marshalltown and rode in this car. He was ticketed to a point on the Austin Branch between Mason City

Junction and St. Paul. It was the custom of defendant to stop its north-bound trains on the crossing, as was done at the time in question, and this custom was known to the employees of the other company. The labor of transferring baggage and express matter to and from the train was more conveniently performed when the baggage and express car was stopped opposite the door of the baggage-room in the depot, and the transfer of cars to the other road was facilitated by dropping them from the train at a point south of the switch connecting the transfer track with defendant's track. The trains were stopped on the crossing as a matter of convenience in transacting the business at that point, but there was no absolute necessity for stopping them there.

At about the time the train arrived at the station the employees of the Chicago, Milwaukee & St. Paul Co. were engaged in getting the engine which was to haul the train to St. Paul out of the yard west of the crossing, and they found it necessary, in order to permit the passage of the engine on the track of the Austin Branch, to move a number of cars from a side track onto the main track. There is a sharp down grade in the main track from a point east of the yard to the crossing. A portion of the cars were pushed onto this grade, and five of them, which were loaded, parted from the others, and ran down the grade to the crossing, striking the passenger car in defendant's train, which stood on the crossing, with sufficient force to throw it from the track and turn it over on its side in the ditch. The train had been at the station about four minutes when the collision occurred. The moving cars were discovered by an employee of the defendant when they were a short distance from the crossing, and he made an effort to get on one of them for the purpose of applying the brakes, but finding that he would not be able to accomplish this before the collision, he jumped off. The passenger car was broken up to some extent by the collision, and the deceased was found under a portion of the wreck. Life was not yet extinct when he was found, but he died before he could be removed from the wreck. The engineer left his engine when the train stopped, and had not returned to it when the collision occurred. The fireman, however, remained on the engine, but no effort was made to move the train after the cars were discovered approaching the crossing. It was the custom of each of the companies to stop all trains at about 400 feet from the crossing, and this custom of each company was known to the employees of the other. It was not the custom to send out flagmen on the track of the other road when a train was stopped on the crossing, and none was sent out on the occasion in question.

1. The circuit court gave twenty-five instructions at the request of the defendant. The ground upon which the motion for a new trial was sustained was that the court erred in giving these instructions. While some of these instructions correctly express the law

of the subject to which they relate, the court might properly have referred them as a whole. The charge given by the Judge on his own motion covered every question involved in the case, and clearly, and in the main correctly, stated the law of the case; so that there was no occasion for giving the instructions asked by counsel. Many of them were but repetitions in other forms of what had already been given by the Judge. Some of them, while being correct in the abstract, were so framed as to be well calculated to mislead the jury; and others, we think, are positively erroneous. One of them is in the following language: "As aids to assist you in determining whether it was or was not negligence for the railway company to permit its train to stand upon the crossing, you may consider the time; whether any train was due upon the railroad crossing defendant's railroad; the position of the baggage-room at that point, and the convenience in discharging baggage and express there; the fact of the connection of any other railroad, and its manner of connecting with defendant's train; the length of time defendant's train stood upon the crossing; the stopping of all trains upon both roads before going upon the crossing; and all other facts and circumstances elicited by the evidence."

STOPPING TRAIN  
ON CROSSING—  
DISCHARGING  
BAGGAGE.

In effect, the jury are told by this instruction that in determining the question whether defendant was guilty of negligence in permitting the train to stand upon the crossing they might consider the fact that the baggage and express matter could be more conveniently discharged at that point than at the one at which it would have been discharged if the train had not been stopped until all of the cars had passed over the crossing. This is clearly wrong. The duty which defendant owed its passengers was to so manage the train as that they would not be exposed to any danger which human foresight and care could apprehend and provide against. And the question whether it was an act of negligence to stop the train upon the crossing depends entirely upon whether the passengers were thereby exposed to such danger; and in determining that question it is manifest that the fact that, by stopping the train at that point, the baggage-car was placed in such position, with reference to the baggage-room, as that the express matter and baggage could be conveniently handled, is entitled to no consideration whatever. It has no tendency to prove that the passengers in the car were exposed to such danger by the stopping of the train at that point, or to disprove it.

Another instruction given at defendant's request is in the following language: "The only act that plaintiff charges against this defendant is that it permitted its train to stand upon the railway crossing at Mason City Junction. You are now instructed that even though you find this defendant did permit its train to stand upon the railway crossing, and that while so standing the plaintiff



was injured by the train or cars of another company running into the train in which plaintiff was, this, of itself, is not negligence; and upon the mere showing of this, without more, the plaintiff is not entitled to recover." This instruction assumes that the only act of negligence complained of by plaintiff was the stopping of the train on which the deceased was travelling upon the crossing. But it is alleged in the petition, not only that the train was negligently stopped upon the crossing, but that the cars of the other company were, through defendant's negligence, allowed to run into and collide with defendant's train; and there was evidence tending to prove that irregular trains—that is, trains that were not run upon any regular schedule time—frequently passed upon the other road, and that the couplings of heavy freight trains were liable to break, and cars by that means escape from the control of the trainmen, and that a train standing upon a crossing was always in some danger of being run into by such trains or by cars which had broken loose from freight trains.

There was also evidence tending to prove that if a flagman had been sent a short distance west of the crossing he might, by climbing upon the cars which collided with the train, and applying the brakes, have stopped them before they reached the crossing. Plaintiff had the right, under the pleadings and evidence, to have the jury pass upon the question whether defendant was negligent in omitting to take proper precaution to protect the train while it stood upon the crossing, from dangers of the character of that which occasioned the injury complained of. The instruction, however, told them that the only act of negligence which was charged against defendant was that it permitted its train to stand upon the crossing. It is clearly erroneous. Objections are urged to other instructions, but we do not deem it necessary to consider them.

2. It is insisted that there is no evidence in the record that the instructions were excepted to by plaintiff at the proper time. It is conceded that the following words, "Given, exc. by plaintiff," or other words equivalent to them, are indorsed in the handwriting of the circuit judge on the margin of each of the instructions given at defendant's request. The point urged by appellant is that it does not appear when these indorsements were made. It is true, doubtless, that plaintiff was not entitled to a new trial on the ground that the instructions were erroneous, unless he took exceptions to them, either when they were given, or within three days after the verdict was returned. Code, §§ 2787, 2789, and subd. 8 of § 2837. The circuit court, it will be borne in mind, sustained the motion on the single ground that it had erred in giving these instructions. It was the duty of the court, before making the order, to ascertain whether the exceptions had been taken in proper time. As the indorsements were made by the

judge, he knew, of course, whether they were made at the time the instructions were given, or subsequent to that; and, in the absence of any showing to the contrary, we will presume that they were taken and noted on the instructions at the time they were given.

3. In addition to the general verdict, the jury answered certain interrogatories which the court, at defendant's request, submitted to them. Among these were the following: "Had defendant any warning or knowledge of the coming of the Milwaukee cars, sufficient to have escaped?" "Could this defendant reasonably have expected or anticipated, under the circumstances, that some cars without any one in control would run down upon the crossing as they did?" The jury answered these questions in the negative, and defendant contends that these findings determine that it was not guilty of such negligence in the transaction as to render it liable for the injury complained of. That the first finding determines that it was not negligent in failing to remove the train from the crossing after the danger was discovered is certainly true. The other finding is to the effect that defendant could not reasonably have anticipated, under the circumstances, that the other company would permit its cars to run down to the crossing and come in collision with its train standing upon the crossing. Defendant's position is that it was bound to anticipate and make provision against such dangers only as might reasonably be expected to arise under the circumstances, and that as the injury complained of was occasioned by the happening of an event which could not reasonably have been expected to happen under the circumstances, it was not negligent in failing to make provision against it. This claim is based upon the idea that the carrier is bound to exercise only reasonable or ordinary diligence and care for the safety of his passenger. But this is not the extent of his duty. He is bound to the most exact care and diligence in all the arrangements for the safety of the passenger. He is bound to make reasonable provision against any danger which human foresight can anticipate. It is his duty to provide for the safety of the passenger "as far as human foresight and care will go." This is the rule on the subject as recognized by the former adjudications of this court. *Sales v. Western Stage Co.*, 4 Iowa, 547; *Frink v. Coe*, 4 Greene, 556; *Bonce v. Dubuque St. Ry. Co.*, 53 Iowa, 278; s. c., 5 N. W. Rep. 177. See, also, *McElroy v. Nashua & L. R. Corp.*, 4 Cush. 400; *Eaton v. Boston & L. R. Co.*, 11 Allen, 500; *Christie v. Griggs*, 2 Camp. 79; *Hutch. Carr.* §§ 498, 504.

As a matter of convenience in the transaction of its business at the station, defendant stopped its train upon the crossing, and kept it standing there while the transfer of baggage was being made. While standing there it was liable to be run into by the trains or cars of the other road. A collision might be

TRAIN STOPPING  
ON CROSSING.

occasioned either by the negligence of the employees of the other company, or by unavoidable accident in the operation of its trains. As defendant chose to place its train in that position, it was under obligation to make provision for the protection of the passengers on its train against the dangers incident to the situation. It may be that defendant could not "reasonably have anticipated" that the employees of the other company would be negligent, or that an accident would happen which might cause an injury to its train while in that position. Still, if, according to human experience and observation, an injury similar to the one in question was liable to occur to a train in that situation, it was bound to make reasonable provision against the danger. The special finding by the jury, therefore, does not necessarily determine that defendant is not liable for the injury.

4. Another position urged by appellant is that the proximate cause of the injury was the act of the employees of the Chicago, Milwaukee & St. Paul Company in permitting the cars which came in collision with the train to escape from their control and run down the grade to the crossing; and that conceding that its act in permitting the train to stand on the crossing, without taking any precaution against the danger, was negligent, still, as that was not the immediate cause of the injury, but was entirely independent of the act which did cause it, it is not liable therefor. But this claim, we think, misconceives the real ground upon which the carrier is held liable for an injury sustained by the passenger. The duty of the carrier to make provision for the safety of the passenger grows out of the contract between the parties; and if he fails, even through negligence, to perform that duty and the passenger suffers an injury in consequence of such failure, the carrier is held liable therefor, on the ground that his negligence constitutes a breach of his undertaking. It may be conceded, then, that the injury would not have occurred but for the act of the employees of the other company in pushing the loaded cars upon the grade and permitting them to escape from their control, and that this was the immediate cause of the injury. But it is equally certain that the collision would not have happened if defendant had not kept its train standing upon the crossing; and, as we have seen, the evidence tends to prove that if it had taken precaution against a danger which might have been apprehended, the collision might have been prevented. If defendant, by stopping the train upon the crossing, exposed the passenger to a danger which might have been anticipated, and at the same time neglected to take any precautions to protect him therefrom, it thereby violated its undertaking with him; and if he suffered the injury in consequence of this violation by defendant of its contract, it is liable therefor, even though the immediate cause of the injury was the wrongful or negligent act of another. The

principle contended for by defendant would govern in a case where one has been injured by the independent acts of two wrong-doers neither of whom owed him any special duty. But it has no application where the act of one of the wrong-doers constitutes a breach of contract. This distinction is clearly recognized by the following cases: *Eaton v. Boston & L. R. Co.*, 11 Allen, 500; *Cuddy v. Horn*, 41 Amer. Rep. 178; *Colegrove v. New York, etc., R. R. Co.*, 20 N. Y. 492; *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628.

5. The following interrogatory was submitted to the jury, and was answered in the affirmative: "Was the death of the deceased of that nature commonly known as instant death?" INSTANTANEOUS DEATH DEFINED. Counsel for defendant contend that this finding determines that the death of Carter was instantaneous, and consequently, as no right of action accrued to him on account of the injury, none survived to his representatives. The position is that at common law an action cannot be maintained for the death of a human being, and there is now no statute in force in this state giving a remedy for such injury; and that the only action which can be maintained by the representatives of a decedent on account of the injuries which occasioned his death is on the right of action which accrued to him before his death, and which survives under the provisions of section 2525 of the Code.

ACTION FOR DEATH. We do not find it necessary to determine whether this position, that the statutes of the State give no remedy for the death of a human being, is sound or not. It is conceded that if a cause of action accrued in favor of Carter for the injury which caused his death, it survived, and may be maintained by his representatives. And, in our opinion, the special finding does not determine that such cause of action did not accrue to him before his death. The finding is that "his death was of that nature commonly known as instant death." A death is not necessarily instantaneous in fact because it is of that nature. If the injury which caused the death is necessarily fatal, and death results in few moments from it, it would no doubt be commonly called an instant death; but, as the person survived the injury for that brief period, it cannot be said that the death was instantaneous. The evidence shows that Carter survived the injury for a few moments. He was not found for some time after the collision occurred, but life was not extinct when he was found. He still breathed, although he died before he could be removed from the wreck. His death, then, was not simultaneous with the injury which caused it. It was not, in fact, instantaneous, although of the character commonly known or designated as instant death. As he lived after the injury, we are of the opinion that if it was occasioned by the negligence of the defendant, a cause of action therefor accrued in his

favor. It can make no difference, we think, that the period of time between the injury and his death was short.

In determining whether a cause of action accrued to him, the test is whether he lived after the injury, and not the length of time he lived thereafter. If he survived the injury but for a single moment, the cause of action accrued to him as certainly as it would have done if he had lived for a month or a year thereafter. This view is sustained by the following authorities: *Hollenbeck v. Berkshire R. R. Co.*, 9 Cush. 478; *Bancroft v. Boston & W. R. Corp.*, 11 Allen, 34; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90.

6. The jury were required to answer the following interrogatories: "Where was the deceased when the collision occurred,—in the car, on the car platform, or upon the ground?" "Was it the part of a prudent person to occupy the position he [the deceased] occupied at the time of the accident?" The answer to the first interrogatory was: "On the platform, we think;" and to the second: "We don't know the position he occupied." Counsel for defendant contend that, as the burden was on plaintiff to show affirmatively that the intestate was not guilty of any negligence which contributed to the injury, he is not entitled under these findings to recover; and consequently a new trial should not have been awarded him. As we have already seen, certain instructions, given by the court, were erroneous, and as the general verdict was undoubtedly influenced by these instructions, plaintiff is entitled to a new trial, unless the special findings determine definitely that he is not entitled to recover. If the jury had found specially that the decedent was guilty of negligence which contributed to the injury, defendant would undoubtedly have been entitled to judgment, notwithstanding the erroneous instructions, as they did not relate to that question, and could not have misled the jury as to it; or if they had found that plaintiff had failed to prove that the intestate did not, by any want of care on his part, contribute to the injury, perhaps the same result would follow, as the burden was on him to prove the absence of all contributory negligence.

We think, however, that the special findings in question do not determine either that Carter was guilty of contributory negligence or that plaintiff had failed to prove that he was not guilty of such negligence. They determine simply that the jury was left in doubt by the evidence as to the position in which he was at the time of the collision. The proof was that he was found under the rear trucks of the car, which had been detached from the body of the car as it turned over on its side. It is clear that he must have been either on the rear platform or on the ground near it when the collision occurred, but there is no evidence as to when he went out of the car. He may have been in the exercise of reasonable care

POSITION OF  
PARTY INJURED:  
CONTRIBUTORY  
NEGLECTANCE.

in either position. The reasonable inference from the circumstances is, either that while in the car he learned in some manner that the accident was about to occur, and attempted to escape by the rear door and was caught in the wreck, or that he had gone out of the car for some purpose before the collision, and was standing either on the platform or on the ground near it at the time it occurred. If the former is the case, he did what the great majority of men would probably have done under like circumstances. Or if he had gone out of the car for some purpose of his own before the collision occurred, the fact that he was on the platform or on the ground is not necessarily evidence of negligence on his part. In doing so he did simply what is done every day by prudent and careful travellers on railroads. The danger of the situation was created, not by the act which he was doing, but by the occurrence, of a circumstance entirely independent of that, and which was not to be anticipated by him in the ordinary course of events. Whether it was an act of negligence, then, for him to be on the platform or on the ground at the time of the collision depends upon whether he knew, or in the exercise of ordinary care might have known of the threatened danger in time to have avoided the injury; and this will be a question for the jury to determine from all the circumstances of the transaction.

All we determine is that the special finding by the jury, that the position occupied by him at the time of the collision was not shown by the evidence, does not necessarily preclude a recovery by plaintiff. As we reach the conclusion that the circuit court rightly set aside the verdict and granted a new trial, we do not consider the questions presented on plaintiff's appeal.

**Affirmed.**

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### ELDRIDGE

v.

MINNEAPOLIS AND ST. LOUIS R. R. Co.

(83 *Minnesota Reports*, 253.)

To rebut the presumption of negligence in a railroad company arising from an accident by which the plaintiff, a passenger on the road, was injured, the defendant offered evidence of the circumstances of the accident, the character and actual condition of the cars, roadbed, and track, and of the speed and management of the train, and also evidence of expert witnesses, tending to show that the track and cars were well built and in good condition, and that the train was properly managed. *Held*, to make a case for the jury upon the question whether defendant exercised due diligence under the circumstances.

The granting of a motion for a new trial for newly-discovered evidence is

largely in the discretion of the trial court; and where such discretion appears to have been fairly exercised in determining such motion, its action in the premises will not be reversed.

ACTION brought in the district court for Waseca county, to recover damages for personal injuries received by plaintiff while a passenger in a car of defendant which was derailed. At the trial before Buckham, J., and a jury, the defendant had a verdict. Plaintiff moved for a new trial upon the following grounds, viz.: (1) Newly discovered evidence; (2) that the verdict is not justified by the evidence; and (3) error in law occurring at the trial, and appeals from an order denying his motion.

*Lewis & Leslie* for appellant.

*Colleston Bros.* for respondent.

VANDERBURGH, J.—It must be admitted that the burden of proof rested upon the defendant in this case to show that the accident by which plaintiff was injured, on the train upon which he was a passenger, was not caused by any want of care or foresight on defendant's part. Such exonerating evidence would naturally embrace, as defendant insists it did in this case, the circumstances of the accident, the management of the train, and also the condition of the cars, roadbed, and track at the particular place.

Whether or not, in this case, there was sufficient evidence to support the finding of the jury in defendant's favor is the principal question on this appeal. The charge in the complaint is that while plaintiff was such passenger the defendant so negligently conducted, in the operation of its road and the management of the train, that the car in which plaintiff was riding was derailed and thrown with great force from the track while the train was running at a high rate of speed, by reason of which he was seriously injured, etc. The testimony of defendant's witnesses tended to show that the roadbed, track, and cars were in good order and repair; that the ties, rails, and fastenings were sound and strong and of good materials; that the second car from the engine was the first to leave the track, and caused the derailment of the other cars; that at the point where it so left the track the rails remained well fastened and in their place after the accident; and that, upon an examination made by the conductor and engineer, who were competent to speak from experience, it did not appear that the accident was caused by any breakage or defect in anything connected with the cars or track. The evidence also shows that the engine was in charge of a skilful and competent engineer; that the train was being managed in the usual way, and was being run at the usual rate of speed, 25 miles an hour, which was considerably less than that of the express trains on the same road; and that the accident occurred just after the engineer had slackened the train

for a crossing, as was customary, by the application of the air brakes, under circumstances which seem to have afforded no reasonable grounds for apprehending it. The conductor testified that trains are often thrown from the track from causes that are not discoverable upon the most careful examination. But if this car "jumped" the track in consequence of "slackening," or "taking up the slack," in the train at the particular place in the road, it was a fact for the consideration of the jury, as, also, whether the happening of the accident from such a cause was consistent with the most careful practical management of the train. *Howard v. St. Paul, M. & M. R. R. Co.*, 32 Minn. 214; s. c., 19 Am. & Eng. R. R. Cas. 283. We think the circumstances of the accident and of the management of the train were sufficiently shown to the jury to entitle them to judge whether the train was managed with due care and skill, under the rule of liability applicable to a carrier in such cases, and we must presume that this rule was correctly given to the jury, though the charge of the court is not made part of the record.

Stress is laid upon the fact that the evidence fails to disclose the real cause of the accident; and it is insisted by the plaintiff that it devolves upon the defendant, in order to exonerate itself from the charge of negligence, and to show that it exercised the highest degree of care consistent with the practical operation of the road, to disclose specifically to the jury the real cause of the accident, and thus make it appear that it was exempt from responsibility. This question relates rather, as we think, to the method of proof by which the result is to be reached. The evidence, as spread upon the record, may seem stronger or weaker according to the circumstances of each case. Yet where it reasonably tends to establish the absence of such responsibility and liability on the part of the carrier, upon all the points in issue, it must be left to the jury to weigh, and their verdict exonerating the defendant, if fairly reached, must be presumed to include a finding of the real cause of the accident, or, if inexplicable, that the defendant was nevertheless exempt from negligence or culpability. *Brehm v. Great Western Ry. Co.*, 34 Barb. 256, 271.

The conductor testified that certain other railroads, with which he was familiar, were "first-class roads," and that he considered this was also a "first-class" road; but as he was particularly interrogated as respects the condition and construction of this road, what he said in reference to other roads, which was received under objection, though immaterial, was harmless. The plaintiff had testified that the train, after proceeding for a while at the rate of 25 miles an hour, started up faster, and at the time of the accident was running at a much higher rate of speed. It was therefore competent for defendant, in rebuttal, to prove the actual speed of the train, and that it was not running faster than

DERAILMENT EVIDENCE OF NEGLIGENCE.

DISCLOSURE OF REAL CAUSE OF ACCIDENT.

TESTIMONY AS TO CONDITION OF ROAD.



the usual rate of speed, which was 25 miles an hour. Plaintiff's objection to this evidence was therefore rightly overruled. That the engineer slackened the train at the crossing, and that it was usual to do so, tended to explain to the jury the facts as to the management of the train at the time, and that there was no irregularity in it, and was properly in rebuttal of plaintiff's testimony on the subject.

As to the newly discovered evidence, it doubtless appeared to the trial court that if the ties and track were actually in the condition sworn to by the witness Brown, reasonable diligence on the part of the plaintiff would have enabled him to have discovered witnesses to prove such facts upon the proper inquiry; and, in view of the strong counter-affidavits introduced on the motion by defendant, we are unable to see that there was any abuse of discretion by the trial court in refusing a new trial on this ground. *Peterson v. Faust*, 30 Minn. 22.

Order affirmed.

See *Texas, etc., R. R. Co. v. Suggs*, *ante*, and note.

## DOUGHERTY

v.

THE MISSOURI R. R. Co.

(81 *Missouri*, 825.)

In an action for damages against a street railway by a passenger for an injury received in consequence of a sudden jerk of the car, it is not incumbent on the plaintiff to show affirmatively the immediate connection between the injury and the misconduct of the carrier, it appearing that the car was under the control of the carrier or its servant, and that the accident was such as, under the ordinary course of things, would not have occurred had those who had the management of the car used proper care.

While such carrier of passengers is not an insurer of their safety, it is bound to use due care and vigilance, so as to safely transport them. It must allow reasonable time for them to enter and leave its vehicle with safety, in the exercise of ordinary care, and should also allow reasonable time for passengers to enter and take seats, if there be any, or reasonable time for them to seize the straps furnished for passengers when standing; and while it may start before a passenger has had time to take his seat or to secure his hold on the strap, it must exercise the utmost care when thus starting, so as not to jar or upset him.

Care and negligence are relative terms, and the degree of caution required of carrier and passenger is to be estimated, in a measure, by the hazard to life and limb; it is always such care and vigilance as a prudent, rational person would exercise under like circumstances.

ERROR to St. Louis Court of Appeals.  
Affirmed.

*Dyer, Lee & Ellis* for plaintiff in error.

*McComas & McKeighan* for defendant in error.

PHILIPS, C.—This is an action to recover damages for personal injury. After the requisite preliminary statements, the petition avers:

“That on or about the 8th day of April, 1877, the said plaintiff, FACTS. for a certain consideration and reward agreed to be paid by him to the defendant, was a passenger on one of the said defendant's cars on said line of railroad, and was exercising reasonable care and diligence, when the said defendant, its agents, servants, and employees, disregarding its and their duty to the plaintiff as such passenger, so carelessly, unskilfully, and negligently managed and operated said car on said line that the said plaintiff was suddenly and violently thrown down and against the side of the said car, and his left hand and arm thrown against and through one of the windows of the said car, whereby his hand was cut, bruised, and lacerated, and the plaintiff states that as the result of said carelessness, negligence, unskilfulness, and injuries, he has ever since been hurt and sick, and by reason thereof suffered, and still suffers, great pain and anguish, and on account thereof has been compelled to have, and has had, his hand and a portion of his said arm amputated and cut off, whereby he has become permanently disabled,” etc. These allegations were put in issue by the answer.

The trial was had before a jury. At the conclusion of plaintiff's evidence the court gave an instruction in the nature of a demurrer to the evidence, whereupon the plaintiff took a nonsuit, with leave, etc. On writ of error to the court of appeals, this judgment of the circuit court was reversed. The defendant has brought the case here on writ of error to the court of appeals.

The plaintiff's evidence showed, substantially, that about the 18th day of April, 1878, he and one McCreary approached defendant's street-car on Olive Street, in the city of St. Louis, between Fourth and Fifth streets, for the purpose of taking passage to go home. The car stopped to admit them. Plaintiff boarded it a little in advance of McCreary. It was raining at the time, and plaintiff had an umbrella in his hand which he closed as he entered the car. The seats on the north side of the car were about full; on the south side there was one lady and perhaps another passenger. Plaintiff moved rapidly forward, about half-way the length of the car, and was just in the act of turning around to take a seat on the south side, when the car started forward with a violent jerk, upsetting him. He dropped the umbrella to catch the strap, but failed to reach it. To save himself he caught or placed his left hand against the window, but his fall was so violent that his hand crashed through the window up to his shoulder. McCreary helped to extricate his

arm. His hand was badly cut. He and McCreary then left the car and went to the nearest drug-store and had his hand dressed. Physicians attended on him. His hand grew worse and finally had to be amputated on the 19th of July following. He knew from travelling on the cars that straps were provided for supporting passengers when standing, etc.

McCreary testified that he had reached the door of the car at the time of the sudden start; that the jerk was unusual and so violent that it threw him against the door-facing, which he caught. Neither of these parties saw the driver or the horses, and only judged that they started the car from the movement forward.

One Jarret, who had been a street-car conductor and driver on this road, testified as to the manner of managing and starting such cars. The cars have wheels and brakes. The brake is used for stopping and starting the car in conjunction with the horses pulling it. The driver is supposed to hold the brake until the car is started smoothly. The team is managed by reins, which the driver holds firmly with one hand and the brake with the other. That by care, etc., the driver so manages the team and the brake as to start the car smoothly. Physicians testified as to the treatment of plaintiff's wound, and the character of the injury, etc.

I. The opinion of the court of appeals in this case, 9 Mo. App. 478, is a satisfactory exposition of the law as applied to the facts in evidence. It would be unnecessary repetition to review the authorities discussed.

Defendant's counsel insist that we review the opinion, because the authorities declare that the injury must result from the negligence and fault of the defendant, and it is incumbent on the plaintiff to show affirmatively the immediate connection between the injury and the misconduct of the carrier. The argument is, that there is no direct proof that the sudden movement of the car was occasioned by any act of the driver or team; that from aught that appears the motion may have been produced by some other agency. Without reviewing the authorities, the following proposition is clearly deducible: That where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, "and the accident is such as, under an ordinary course of things, does not happen, if those who have the management use proper care," it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Scott v. Dock Co.*, 10 Jur. (N. S.) 1108; *Briggs v. Oliver*, 4 Hurl. & Col. 407; *Mullen v. St. John*, 57 N. Y. 568, 569.

The car in question was under the exclusive management of the defendant. The team and the brake were the motive power, and these were under, or should have been under, the control of the driver. By proper or ordinary vigilance and management of

PRESUMPTION  
THAT ACCIDENT  
AROSE FROM  
WANT OF CARE.

this brake and team, the car would not have started with such violence as shown by the evidence. If the movement came from the team, "under an ordinary course of things" the jerking would not probably have happened "if those who had the management had used proper care." The evidence showed that the motion was forward. Presumably, therefore, it came from the action of the motive power, the brake and the team. Presumptions arise on the usual and natural course of things. One of the chief grounds of evidence "is the known and experienced connection between collateral facts and circumstances satisfactorily proved and the fact in controversy." 1 Greenlf. Ev. 17. As the team and the brake are the means by which a stationary car is put in motion, when the movement was forward, in the direction of that power, it is hardly reasonable to say it is merely conjectural that the motion came through the agency of the driver. Had the car been thus suddenly and violently jerked by the application of some other external force, not under the control of the driver, it would have been unusual and outside of the ordinary course of things. In such case it would certainly be reasonable to require the defendant to show such fact, so peculiarly within its knowledge.

It is said by the court in *Briggs v. Oliver*, *supra*: "Packing-cases carefully placed in a proper position do not naturally tumble down of their own accord, and we have no right to assume that the fall of this packing was caused by the act of some one who was not the defendant's servant."

In *Mullen v. St. John*, *supra*, the court say: "Buildings properly constructed do not fall without adequate cause. If there be no tempest prevailing, or no external violence of any kind, the fair presumption is that the fall occurred through adequate causes, such as the ruinous condition of the building, which could scarcely have escaped the observation of the owner. The mind is thus led to a presumption of negligence on his part, which may, of course, be rebutted."

So here, the natural presumption is that when the car started suddenly forward it was put in motion by the driver, who had control of the motive power; and in the absence of proof that the movement was produced by some extraordinary cause, not within the control of the driver, or which he could not have prevented by the exercise of due care and vigilance, the plaintiff was entitled to a verdict.

II. With respect to the obligation of the defendant to the plaintiff as a passenger, it is sufficient to say that while it is not an in-

DUTY OF STREET  
CAR COMPANIES  
TO PASSENGERS. surer of the safety of passengers, it is bound by its office, as such carrier, to exercise due care and vigilance so as to safely transport them. It must allow reasonable time for passengers to enter and leave its car with safety, in the exercise of ordinary care. It should allow the passengers reasonable time to enter

and take a seat, if there be one, or reasonable time to seize the straps furnished for passengers when standing; and while it may start its car before the passenger has had time to take a seat or secure his hold on the strap, it must exercise the utmost care in starting so as not to jar or upset him.

III. Counsel call our attention to some authorities to support the proposition that carriers of passengers by street cars are not bound to the same degree of care as carriers by steam. Care and negligence are relative terms. The degree of caution, both by carrier and passenger, is to be estimated, in a measure, by the hazard to life and limb. It is always such care and vigilance as a prudent, rational person would exercise under like circumstances. *Flynn v. Railroad*, 78 Mo. 195.

IV. It is not necessary to decide whether the petition in question would be liable to demurrer. It is amply sufficient to support a verdict for the plaintiff on issue joined.

The judgment of the court of appeals is affirmed and cause remanded accordingly. All concur.

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McINTIRE R. R. Co.

v.

BOLTON.

(*Advance Case, Ohio. May 12, 1885.*)

The plaintiff was a passenger on defendant's railroad, on a car northward bound. The railway was a single track, with occasional side tracks for the passage of cars moving in opposite directions. The north-bound car having been drawn beyond the side track, where it was to have met the south-bound car, it became necessary to push it back to the side track, so that the cars could pass and each proceed to its destination. At the request of the driver of the north-bound car, the plaintiff assisted him in pushing the car back to the side track. While so engaged, without fault on his part, he was injured by the carelessness of defendant's driver on the south-bound car. *Held* (1) the plaintiff did not engage in the service of defendant as a mere volunteer; (2) under the circumstances the plaintiff cannot be considered as a fellow-servant with the driver of the south-bound car; (3) in the case stated the doctrine of respondent superior applies.

THE head note states the facts sufficiently.

Error to the district court, Muskingum county.

*Frank H. Southard* for plaintiff in error.

*Evans & Beard* for defendant in error.

McILVAINE, C. J.—It is undoubtedly a well-established principle of law that a master who is guilty of no carelessness in employing servants, is not liable to one for injuries caused by the carelessness of a fellow-servant, while both are engaged in the common service, and no relation of subordination exists

RISK OF CO-SERV-  
ANT'S NEGLIGENCE

between them. In such case each servant assumes the risk of injuries from the carelessness of fellow-servants. It is also well settled that a person who without any employment voluntarily undertakes to perform service for another, or to assist the servants of another in the service of the master, either at the request or without the request of such servants, who have no authority to employ other servants, stands in the relation of a servant for the time being, and is to be regarded as assuming all the risks incident to the business.

But it does not follow that, under all circumstances, a person who assists the servants of another in the discharge of their duties, without employment by the master, is to be regarded as voluntarily assuming the relation of a fellow-servant, or the risks pertaining to that relation. To illustrate, suppose a servant in driving his master's team on a highway founders in such a manner as to prevent the use of the highway by others for the time being. Another person, who is thus impeded in the use of the road, assists the servant, either with or without request, to remove the impediments to travel from the highway. Such other person does not thereby become the fellow-servant of the driver. Indeed, in no just sense has he voluntarily entered the service of the master. And the rule of law first above stated does not apply to the case supposed, and therefore it was not error in the court of common pleas to refuse it.

The law of the case was properly given in the charge. The plaintiff in the court of common pleas was not a mere volunteer, within the meaning of the rule of law contended for by plaintiff in error, but, as a passenger on the north-bound car, was interested in having it driven to its destination. To this end it was necessary to pass the south-bound car. This could only be accomplished by pushing the north-bound car back upon the siding. In doing this, although it may not have been absolutely necessary for the passenger to assist the driver, it was a prudent and reasonable act, justified by the circumstances of the case, not a wrongful interference and intermeddling with business in which he had no concern. It was not, in fact or in law, an assumption of risk from the carelessness of the defendant, or any of its servants. The law of this case is well stated in *Wright v. London & N. W. Ry. Co.*, 1 Q. B. Div. 252. That case was this: "The plaintiff sent a heifer (which was put into a horse-box) by defendant's railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse-box to the siding, from which alone the heifer could be delivered to the plaintiff, in order to save delay, he assisted in shunting the horse-box, and while he was so assisting he was run against and injured, through a train being negligently allowed by the defendant's servants to come out of the siding. There was evi-

PASSENGER  
PUSHING CAR NOT  
A MERE VOLUN-  
TEER.

dence that the station-master knew that the plaintiff was assisting in the shunting, and assented to his doing so; *held*, affirming the decision of the queen's bench, that the plaintiff was not a mere volunteer assisting the defendant's servants, but was on the defendant's premises, with their consent, for the purpose of expediting the delivery of his own goods; and the defendants were, therefore, liable to him for the negligence of their servants, according to the principle of *Holmes v. Northeastern Ry. Co.*, L. R. 4 Exch. 254; L. R. 6 Exch. 123."

Judgment affirmed.

(See, as to imputable negligence, *Gray v. Phil. & R. R. Co.*, and note *infra*.)

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ABELL

v.

WESTERN MARYLAND R. R. Co.

(*Advance Case, Maryland.* 1885.)

An employee of the Western Maryland R. R. Co., while riding to his home on a free pass, after the usual services of his employment were over for the day, was killed in a collision caused by the negligence of the company's servants. *Held*—

1. That an employee being carried while not engaged in the service of the company at the time of the collision is substantially a stranger and entitled to all the remedies he would have had if he had not been a servant.

2. When a carrier undertakes to carry a person gratuitously, the passenger is entitled to the same degree of care as if he had paid his fare.

APPEAL from the Court of Common Pleas.

*James W. Denny* for plaintiff in error.

*Marshall & Hull* for defendant in error.

STONE, J.—This is an action brought under the statute in the name of the State, for the use of the appellant, as FACTS. widow of William G. Abell, whose death was caused, as the appellant avers in her narrative, by the wrongful act, neglect, and default of the appellee. The plea of not guilty was entered by the appellee, and at the trial the only defence set up was that the deceased, William G. Abell, was, at the time of his death, an employee in the service of the appellee, and that if his death was caused by the negligence of the other employees of the appellee, then that the appellee was not liable.

It seems to be a concession, at least as far as this trial goes, that the death of Abell was caused by the negligence of the appellee's

employees, and the only question for us to decide is whether, at the time of his death, Abell was such an employee of the company that it would be exempted from liability for damages caused by the neglect of his co-employees. The facts, as far as it is necessary to state them, are these:

Abell was employed as a regular brakeman on a passenger train that left Union Bridge every morning, except Sundays, for Baltimore city, and returned to Union Bridge every afternoon, Sundays excepted. Abell was employed and paid by the day, and was liable to be discharged at any time. Union Bridge was at one end of the route and Baltimore city at the other. When the train reached Union Bridge on Saturday evening it remained there until Monday morning, and Abell was expected to be at Union Bridge from Saturday evening until Monday morning, unless he had permission to leave. Abell's family lived in Baltimore, and he had permission from the conductor to go to Baltimore on Sunday, the 2d of September, 1883, and while travelling to Baltimore from Union Bridge on a train of the appellee was killed by a collision. The conductor of the train upon which Abell acted as brakeman had a regular pass for himself and all his crew to go to Baltimore on the train upon which Abell was killed. He, Abell, as one of the crew, was travelling on this pass, and paying no fare at the time he was killed.

The deceased was not paid for the Sundays unless he was required for duty. He was not required for duty on Sunday, September 2, 1883, the day he was killed.

The first question with which we have to deal is the inquiry whether on Sunday September 2, 1883, Abell was in the employment of the railroad company in such a manner that the company is entitled to claim the benefit of the rule that would exempt it, from liability for the negligence of its other employees?

A case very similar to the one before us has already been decided by this court, in Trainor's case, 33 Md. Trainor was employed and paid by the day. At 6 o'clock P. M. his day's work ended, and on a day that he had been at work, but had finished his day and laid aside his tools, and was on his way home, and not on that portion of the track upon which he worked, the injury occurred. He had expected to resume his work the next morning.—With these facts before it, this court decided that at the time of the injury he could not be considered in the employment of the company.

The decision in Trainor's case proceeds upon the assumption that he was not, at the time of the injury, acting in the service of the company; that his day's labor was over for the day, and, although he expected to resume work again on the next day, that when his day's work was over he occupied towards the company the posi-

WHETHER SERV-  
ANT RIDING ON  
PASS IS AN EM-  
PLOYER. AU-  
THORITIES.



tion of a stranger, and was entitled to all the privileges he would have had if he had not been an employee.

The facts in this case are stronger than those in Trainor's case. The deceased had finished his week's work on Saturday evening, expecting to resume it on Monday. He had been expressly relieved from all service to the company until Monday, and was given permission to go to Baltimore. He could call the Sunday on which he was killed entirely his own day and to employ himself in it as he pleased, and he therefore could not be considered on that day as acting in the service of the company.

The principles of Trainor's case are, we think, fully sanctioned by the English cases. In *Hutchinson v. The York, New Castle & Branch Ry. Co.*, 6 English Railway and Canal Cases, the court exempted the railway company from liability for the death of Hutchinson, because, it said. "The death of Hutchinson appears on the pleadings (the question having arisen on demurrer) to have happened while he was acting in the discharge of his duties to the defendant as his master, and to have been the result of carelessness on the part of one or more other servant or servants of the same master while engaged in their service." And the court held the railway company not liable; but, lest the principle there stated might be carried too far, the court proceeded to say:

"It may be proper, with reference to this point, to add that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by another servant, where the servant injured was not, at the time of the injury, acting in the service of his master. In such a case the servant is substantially a stranger and entitled to all the privileges he would have had if he had not been a servant."

The case of *Tunney v. The Midland Ry. Co.*, cited by the appellee, is not in conflict with the *Hutchinson* case. In that case Tunney was a day laborer, who was to be carried by express contract on the defendant's train daily from Birmingham, where he resided, to the spot where his work was to be done, and carried back when his day's work was over to Birmingham. He was injured while returning home on the defendant's train, and the court, Erle, C. J., said:

"The only question is whether the plaintiff was at the time in the employ of the company? Clearly he was. It was part of his contract of service that he was to return each day to Birmingham by the pick-up train, to be ready to start on his work the next morning. There is, therefore, nothing to take the case out of the ordinary rule."

Willis, J., said: "The circumstance of the plaintiff's day's work being at an end when the accident happened can make no difference, for it was part of his contract that he was to be carried by the train to and from the place where his work happened to be."

The case of *Mashall v. Stewart*, 33 E. L. & E., also cited by the appellee, turns entirely upon the duty and responsibility of the master to the servant, and not upon the negligence of a fellow-servant, as this case does.

The case of *Lucas v. Boston & Maine R. R.*, 14 Gray, and the case of *Gilshannon v. Stony Brook R. R. Co.*, 10 Cushing, cited by the appellee, were decided upon the theory that the defendant had agreed to convey the plaintiff to and from his work, and that the accident happened while being so conveyed. That such conveyance was in fact part of the contract.

But other American cases do not agree with the cases in Gray and Cushing. In the case of *O'Donnell v. The Allegheny R. R.*, 59 Pa. State, the plaintiff, a carpenter, was employed by the railroad to work on a bridge some fifteen miles from his home. In consideration of a reduction in his wages, the company agreed to carry him to and from his work. On his returning home on a certain day the accident happened. Agnew, J., in delivering the opinion of the court, said: "The plaintiff, O'Donnell, was travelling, not as a part of his employment as a carpenter at the bridge, but as a passenger from and to his home. When his day's work was performed he was no longer in the service of the company, but was free to go or to stay."

So also in the case of *Russell v. Hudson River R. R. Co.*, 5 Duer. In that case the road employed the plaintiff by the day, and agreed to carry him to and from his work. On his return the accident happened. The Superior Court of New York held the company liable, although it was part of the contract that the company should carry the plaintiff back to his home. They held that the plaintiff had performed all his part of the contract.

In whatever else they may differ, these cases all agree upon one principle, and that is that if the plaintiff is not at the time of the accident engaged in the actual service of the company, or in some way connected with such service, the company is liable for the negligence of its employees. That because he works daily for the company, and is styled its employee, the company is not exempt from liability for the negligence of its other servants at all times and under all circumstances. That the exemption depends upon actual service within the scope of his employment.

In the case before us the servant was not at the time of the injury acting in the service of the master. Nor was he engaged in fulfilling any part of the contract with his employer. It was no part of his contract with the railway company that he should go to Baltimore to visit his family, but such visits were entirely outside and foreign to the service he owed it, and which he had contracted to perform. By the express permission of his superior officer he was released from the obligation of service for the day on which he

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was killed. He was therefore, on that day, substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant, unless the fact urged in the argument by the appellee, that he was riding in the cars upon an employee's pass, will alter the case.

It is not necessary for us to consider the question of the powers of a transportation company to exempt itself from liability for the negligence of its employees by special contract entered into with the recipients of the free passes. It does not appear from the record in this case that there was any such contract entered into between Abell and the company.

EXEMPTION OF  
COMPANY FROM  
LIABILITY TO  
EMPLOYEES.

Abell had, it seems, only the common employee's pass which enabled him to ride free, and that is all. He had made no agreement with the company exempting it from liability, but was only exercising the privilege that he had in common with the other employees, of riding in the company's cars without paying fare.

Mr. Cooley, in his work on Torts, goes so far as to say that carriers of passengers cannot relieve themselves from the obligation to observe ordinary care by any contract whatever, even in cases where free passage is given as a matter of favor or courtesy. Cooley on Torts, 685. He says that in some of the States it has been held to be competent to contract against liability for any negligence except that of the carrier himself, but that the weight of authority, both in England and in this country, is distinctly the other way.

But the question of exemption of the carrier from liability for accidents by special contracts not arising in this case, it is unnecessary to examine the authorities on that point, and we will confine ourselves to cases where the passenger was carried gratuitously but without special contract.

In the case of *The Philadelphia and Reading R. R. Co. v. Derby*, 14 Howard, the plaintiff was a stockholder in the company, riding by invitation of the president and paying no fare, and not in the usual passenger cars when he was injured. The court below instructed the jury that, notwithstanding these facts, if they found that the injury was caused by the gross negligence of the servants of the road, the company was liable. Upon appeal the Supreme Court of the United States said, in affirming the judgment: "This duty (to carry safely) does not result alone from the consideration paid for the service. It is imposed by law even where the service is gratuitous. The confidence, indeed, by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. It is true a distinction has been taken in some cases between simple negligence and great or gross negligence; and it is said that one who acts gratuitously is only liable for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict

has found it to be a case of gross negligence. When carriers undertake to carry persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passenger should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of "gross."

The principle announced in this decision, that the duty of the carrier to carry safely does not result from the consideration paid, but is imposed by law, has been recognized by this court on the motion to re-argue the case of the Baltimore City Pass. Railway Co. v. Kemp and wife, 61 Md. 619; s. c., 18 Am. & Eng. R. R. Cas. 220, where the court says that a common carrier who accepts a party to be carried owes to that party a duty to be careful, irrespective of contract; and this court illustrates the principle by the example of a child for whom no fare is paid, but who could recover in case of injury the result of negligence.

In the case of the Steamboat New World *et al.* v. King, 16 Howard, the point again directly arose whether a passenger who was carried gratuitously could hold the company liable for gross negligence? The court quoted the paragraph we have quoted from the opinion in 14 Howard, and say in relation to it:

"We desire to be understood to reaffirm that doctrine as resting not only on public policy, but on sound principles of law."

The court further say that it is doubtful whether degrees in negligence can be usefully applied in practice, or that their meaning is fixed, or capable of being fixed, and strongly intimate that the theory of degrees in negligence is unfounded in justice, useless in practice, and presenting inextricable embarrassments. The court said, however, that the case before it was a case of gross negligence, according to the tests which had been applied to such cases.

There are degrees of negligence, in the sense that some acts evidence a greater degree of carelessness and recklessness than do other acts which may still be classed as negligent.

Relying upon the cases in 14th and 15th Howard, above referred to, Judge Wallace, in the case of Waterbury v. N. Y. Central R. R., decided in 1883 in the United States Circuit Court for the Northern District of New York, 17 Fed. Rep., said:

"The carrier does not, by consenting to carry a person gratuitously, release himself from responsibility for negligence. When the assent for his riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he had paid his fare."

The pass was no part of the contract between Abell and the railroad. The contract between them was to pay a certain sum for a day's work. It was given as a mere gratuity, and as other papers

are given. No action for a breach of contract could have been maintained by Abell if the road had taken away the pass at any time. Sometimes a special contract is made with the recipient of the pass, and written or printed on it, that the person accepting the pass will, in consideration thereof, assume all the personal risk incident to the travel. We must not be understood to decide upon the legal effect of such a contract. That question does not arise in this case, and it will be time enough to decide it when it does arise. All that we mean now to decide is, that when the carrier undertakes, without any such special contract, to carry a passenger gratuitously, he is entitled to the same degree of care as if he had paid his fare.

It follows from what we have said that there was error in the instruction granted by the court, and that the first and second instructions asked by the plaintiff presented substantially the law of the case.

Judgment reversed, with costs, and new trial awarded.

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MOORE

v.

WABASH, ST. LOUIS AND PACIFIC R. R. Co.

(*Advance Case, Missouri. May 25, 1885.*)

Plaintiff, who was a car-repairer, was ordered by the foreman in charge to go under certain cars and repair a defective draw-bar, said foreman assuring him that he would see that the cars were not moved. No red flags were put out, according to the rules of the company, warning all parties not to move the cars. Notwithstanding the promise of the foreman, the cars were moved while plaintiff was under them, and he was injured.

*Held*, that the foreman and the car-repairer were not fellow-servants, and that the railroad company had not discharged its full duty in making the regulation requiring flags to be put out, but that it was liable for the foreman's negligence.

*Wells H. Blodgett and George B. Burnett* for appellant.  
*Louis H. Waters and Louis E. Wyns* for appellee.

HENRY, C. J.—This is an action to recover damages for an injury alleged by plaintiff to have been sustained by him while in the employ of defendant as a car-repairer. The cause of action stated in the petition is that at Stanberry, a station on defendant's road, defendant kept a car-repair shop, and had in its employ a foreman of car-repairs who had sole charge and control FACTS. of hands employed to repair cars. That on the 19th day of Octo-

ber, 1881, and while plaintiff was so employed as a car-repairer, the said foreman ordered and directed the plaintiff to repair the draw-head of one of the freight cars of defendant company, then standing with other freight cars upon a side-track of defendant at said town of Stanberry, and while said cars were detached from any engine; that said foreman of car-repairs then and there promised plaintiff that he would protect him while so employed in repairing said draw-head, and would prevent and keep away any train or engine from coming in or entering upon the said side-track; and plaintiff, in obedience to the order and direction, and relying on the promise of said foreman, undertook to repair the draw-head of said freight car, and while engaged thereat and being upon the side-track of said defendant and between two of the freight cars of said company, an engine of defendant came in and upon said side-track, and against the cars standing thereon, and the car upon which the plaintiff was at work was driven back against the freight cars standing in the rear thereof, and plaintiff's right arm was caught and crushed between said cars; that the said foreman failed and neglected to protect plaintiff while at work on said draw-head, and failed and neglected to prevent and keep said engine from coming upon said side-track, and utterly failed and neglected to notify or inform the person in charge of said engine that plaintiff was at work upon the draw-head of said car upon said side-track.

The answer denied every allegation in the petition, and for a further defence alleged that at and long prior to the date of plaintiff's injury the defendant had adopted a rule requiring all car-repairers, when engaged in repairing cars, to set out red flags on each side of the place where they were at work as signals of warning to approaching trains, and that Kestler, the foreman, and the defendant, and O'Connor, who was at that time engaged with plaintiff in repairing the car in question, had notice of the rule, but that plaintiff and O'Connor on that occasion neglected to observe it, and that the injury was attributable to his own and the negligence of O'Connor, his fellow-servant.

The replication was a denial of the new matter pleaded in the answer.

On the trial plaintiff had a judgment for \$8,450, from which defendant has appealed.

It is virtually conceded by plaintiff that no red flags were set out as required by the rule of the company, but there was evidence tending to prove that plaintiff had no knowledge that such a rule had been adopted.

There was evidence, however, tending to prove the facts alleged in plaintiff's petition, and the question in the cause which presents the most difficulty is whether plaintiff and the foreman of car-repairs were fellow-servants. If they were not, and the foreman is to be regarded as the *alter ego* of the company in

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the transaction which is the basis of this action, plaintiff was absolved from the duty of observing said rule by the promise of the foreman to use proper precautions for his safety.

Appellant's counsel say that the rule by which to determine who are fellow-servants is well stated by Mr. Wood in his work on "Master and Servant," at page 860, as follows:

"Whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of those duties by the middleman he stands in the place of the master, but as to all other matters he is a mere co-servant."

The cases on this subject, reported in the books, are numerous and contradictory, and it would be an endless task to review and utterly futile to attempt to reconcile them.

Whether the foreman in this case had or had not authority to employ and discharge car-repairers by no means determines his relation to the plaintiff at the time the latter was injured.

It is asserted in some of the cases that it is a test, but a corporation might adopt a by-law taking from every officer of the company the authority to employ and discharge hands, and vest it in the board of directors, still leaving with the proper officers the control and direction of the work the hands were engaged to perform. This would not constitute the general manager or other general officer a fellow-servant of all the men engaged in his department of the service. If the law were otherwise, a railroad corporation would escape liability to its servants in every case unless it should be proved that the directors had negligently employed the servant whose negligence occasioned the injury, or retained him in the service after learning his unfitness.

If we may venture a general proposition on the subject, it is, that all are fellow-servants who are engaged in the prosecution of the same common work, having no dependence upon or relation to each other except as co-laborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them.

If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employee, as to that service, stands in the master's stead with relation to other persons.

A railroad corporation impliedly contracts, not only to furnish suitable machinery and appliances for its employees to operate and work with, but to keep them in repair, and the latter duty stands upon no different ground than does its obligation to furnish suitable machinery in the first instance.

FELLOW-SERVANT—VICE-PRINCIPAL—RIGHT TO EMPLOY AS TEST.

PERSON EMPLOYED TO DISCHARGE MASTER'S DUTY STANDS IN MASTER'S STEAD.

MACHINERY—DUTY OF MASTER

When he whose duty it is, as representative of the company, to inspect the machinery, sends any of it to the shop for repair, the company is at once chargeable with notice of its condition, and the foreman in having it repaired for use is in the line of his duty.

It is true the company was under no obligation to the plaintiff to have the car in question repaired at all. It owed no duty to any one, except servants who were to use it, or passengers or shippers of freight in that car to repair it, but the repair of the car was the company's business if undertaken at all. The company being a corporation could not be actually present, either to make or direct repairs, but, having ordered its repair, it had to be represented by some one or more to do the work, and by some one to determine where, how, and when it should be repaired.

The person who had control of the work, and of the men engaged in it, directing how, when, and where it should be done, represented, in those matters, the company itself.

It was the duty—a contractual obligation of the company—to provide for the safety of the men at work in repairing the car.

The company devolved that duty upon the person who represented it in conducting, ordering, and managing the work, and the men engaged in it.

It could not impose that duty upon the car-repairers, so as to absolve itself from liability for its own negligence. It might make, as it did, reasonable rules, and impose the duty upon the servant to observe those rules for their own safety, but could not impose upon them the entire duty of protecting themselves.

The foreman, in what he had to do for the company, did not represent himself. Except as the agent of the company he had no interest in the repair ordered. He did none of the manual labor in repairing the car, but, for the company, gave such orders and directions to the car-repairers as he thought proper. That the foreman was an inferior servant to Buck, who had a general control and management of car-repairs everywhere along the line of the road, does not determine that the foreman was a fellow-servant of plaintiff.

In some of the cases and text-books the rule is announced that where a master has committed the entire control and management of his business to another, reserving no discretion or control to himself, the person to whom such power is delegated stands in the place of the master, so that his acts are, in law, the acts of the master.

Such authority to an agent would certainly constitute him the *alter ego* of the principal; but it is not true that because the master has reserved, either to himself or some superior agent, some control over the inferior agent, the latter cannot stand in the place of the master. Strictly

FACT THAT ONE  
HAS A SUPERIOR  
DOES NOT PRE-  
VENT HIS BEING  
A VICE-PRINCIPAL



speaking, all servants from the general manager down through all the grades of the service to a brakeman are engaged in the common work of running trains of cars, and it is only when one of these servants is placed "by the master in his stead to discharge some duty which the master owes to the servant" that he ceases to be the fellow-servant of the others and becomes the representative of the master.

Every spike driven into a cross tie is driven with reference to the running of trains over the road, and the man who wields the sledge to drive it is, in some sense, a fellow-servant of every one employed by the company whose services are necessary to the running of trains.

Says Mr. Wood, "The instances are rare in which the master, either by himself or some superior servant, does not reserve some supervision over every department of his business, or, at least, reserve such a right to himself." Sec. 438.

Buck, the general superintendent of car-repairs, was not a fellow-servant of plaintiff, and could not have been so regarded if he instead of Kestler had been present and given the order and made the alleged promise to protect plaintiff in obeying that order. And if, by authority of the company, Kestler was placed there to do what fell in the line of Buck's duty, did he not, in respect to that matter, stand in the same relation to the company as Buck himself? And if Buck had personally done what it is alleged Kestler did, could the company have successfully defended the action on the ground that Buck and plaintiff were fellow-servants? We recognize the principle that one may act in the dual character of a representative of a master and as a fellow-servant. If it had been the duty of the foreman, in this case, to assist, when necessary, in the manual work of repairing the car, in addition to the other duties of superintending, controlling, and directing such work, and he had gone under the car with plaintiff to assist in repairing it, and by some negligence or unskilful act while so engaged injured the plaintiff, the latter could not have recovered without proof of facts which entitle one to recover when injured in consequence of the negligence or unskilfulness of a fellow-servant.

ONE MAY BE  
BOTH FELLOW  
SERVANT AND  
VICE-PRINCIPAL.

Under the circumstances proved in this case, we think that plaintiff and Kestler were not fellow-servants.

The defendant's refused instructions asserted the following general propositions, viz.: That although plaintiff and Kestler were not fellow-servants, Kestler was not authorized by the company to make the promise alleged to protect plaintiff while under the car, and that notwithstanding such a promise yet plaintiff could not recover if he failed to set out the red flag as required by the rule, or to set some one to watch for the approach of engines and trains.

It being conceded, as it must be, that the company owed a duty

to the men under the car to provide for their safety, can it be that the foreman had no authority in an emergency to use any other means than those adopted by the company—that the red flag, and nothing but the red, was the means he was to employ?

If for any reason that would clearly, in a given case, have been insufficient as a warning, can it be possible that the foreman would be restricted to the use of red flags? Or, if in such case, he had had the red flag set up, and one of the men was injured in consequence of its insufficiency to give the warning, that the company would not be liable to the injured party?

Has it discharged its duty by simply adopting a means of protection ordinarily sufficient when the person in charge of the work knows that in the particular case it is not a sufficient warning?

If the foreman has authority in such an emergency, that authority results from his general authority to perform the duty of the company in protecting the employees under his control in the performance of a dangerous work for the company, and he was authorized to make the promise to the plaintiff for the company, and undertook to set out the red flag in his possession, or to adopt any other means necessary to secure the safety of the men, thereby absolving them from the duty of setting out the flag or setting the watch. As to the latter, there was no proof of a rule requiring one man to watch while the others worked; and it was in proof that while the work in question could possibly have been done by one man, it could not be conveniently or promptly done by less than two. It being the duty of the company to provide for the safety of men while engaged in its dangerous service, if it delegates such authority as to the employment of men and their control and management to an agent, will the law, in the absence of an express stipulation to that effect, declare that such agent is under no obligation and has no power, as the representative of the company, to provide means for the safety of servants whom he sends in a place of danger to work?

If so, the duty of the company to provide such security may be easily evaded by having no one on hand to perform it. And by simply adopting reasonable rules, the observance of which will ordinarily afford protection, although in a given instance the observance of such regulations would afford no protection whatever, and the person representing the company in the direction of the work and the control of the hands knew the fact, such abdication of duty can certainly find no support either in reason or authority.

The judgment is affirmed. All concur.

**Liability of Master to Servant for Injuries caused by a Fellow-servant.**—This subject came before the Supreme Court of Indiana, in *Indiana Car Company v. Parker*, 100 Ind. 191; a case which, while properly excluded from this series of reports because not strictly a railway case, is yet worthy extended quotation in a note, because it presents one of the most thorough dis-

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LOOK OUT FOR  
SAFETY OF  
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cussions of the law of master and servant we have seen. In that case (*Indiana Car Company v. Parker, supra*), the complaint of the appellee alleged that he was employed by the appellant; that while engaged in the discharge of the duties of his employment he received an injury, and that this injury was caused by the fault and negligence of the appellant in providing unsafe and defective machinery.

In a very able and elaborate brief, counsel for appellant argued that the appellee was not entitled to recover because the negligence which caused the injury was that of a fellow-servant, the foreman of the shop in which the appellee was employed; and that for such negligence the employer is not liable.

The court, by Elliott, J., said: We concur with counsel in the statement of the general principle that a foreman is a fellow-servant of those working with him, and that for the foreman's negligence in the discharge of his duties as foreman the master is not responsible to a fellow-servant. The overwhelming weight of authority sustains this general doctrine, and our own court has been one among its staunchest supporters, as a long line of decisions attest. *Ohio, etc., R. R. Co. v. Tindall*, 18 Ind. 366; *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226; *Slattery v. Toledo, etc., R. R. Co.*, 28 Ind. 81; *Ohio, etc., R. R. Co. v. Hammersley*, 28 Ind. 371; *Columbus, etc., R. R. Co. v. Arnold*, 31 Ind. 174; *Sullivan v. Toledo, etc., R. R. Co.*, 58 Ind. 26; *Gormley v. Ohio, etc., R. R. Co.*, 5 Am. & Eng. R. R. Cas. 581; *Robertson v. Terre Haute, etc., R. R. Co.*, 8 Am. & Eng. R. R. Cas. 175; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Drinkout v. Eagle Machine Works*, 90 Ind. 423.

In a recent case, *Railroad Co. v. Ross*, 17 Am. & Eng. R. R. Cas. 501; the Supreme Court of the United States, by a divided court, four of the judges dissenting, laid down a somewhat different doctrine, but, as said by a reviewer, "it is probable that a doctrine approved by Chief Justice Shaw and uniformly followed by every State except three or four, will hold its own against a bare majority decision of the Federal court." 81 Alb. L. J. 81.

In *Columbus, etc., R. R. Co. v. Arnold, supra*, the principle was applied to a case where the servant injured was a fireman on a locomotive, and the person guilty of negligence was a master mechanic. That case is an extreme one, and does, perhaps, carry the doctrine beyond its limits.

In *Robertson v. Terre Haute, etc., R. R. Co., supra*, the servant injured was a brakeman, and the agent guilty of negligence was a train-despatcher; and in *Drinkout v. Eagle Machine Works, supra*, the servant who received the injury was employed as a laborer in the shop of which the agent guilty of negligence was a foreman.

In *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282, the principle was applied to the case of a "bank boss" in a coal-mine, whose duties were the same as those of a foreman. We shall find abundant authority to the same effect outside of our own reports.

In *Wilson v. Merry*, 1 L. R., 1 Scotch & Divorce App. 326, it was held by the House of Lords that a servant employed as a miner could not recover against the owner of the mine for injuries caused by the negligence of the manager. Decisions involving similar principles will be found in *Brown v. Accrington, etc., Co.*, 8 H. & C. 511; *Wigmore v. Jay*, 5 Exch. 352; *Searle v. Lindsay*, 11 C. B. N. S. 428; *Howells v. Landore, etc., Co.*, L. R., 10 Q. B. 62 (11 Moak's Eng. R. 153); *Allen v. New Gas Co.*, L. R., 1 Exch. Div. 251.

In *Albro v. Agawam*, 6 Cush. 75, the agent guilty of negligence was the superintendent of a factory, and the servant injured was a person employed in running one of the spinning-machines, and it was held that the relation was that of fellow-servants. *Northcoate v. Bachelder*, 111 Mass. 322, and *Zeigler v. Day*, 123 Mass. 152, assert a like doctrine.

In the case of *Hard v. Vermont, etc., R. R. Co.*, 82 Vt. 473, the injured servant was an engineer, and the person guilty of negligence a master mechanic in charge of the locomotives, and it was held that the principal could not be made answerable. *Brown v. Winona, etc., R. R. Co.*, 27 Minn. 162, decides that the relation of fellow-servants exists although one is the overseer or foreman. It is, however, held in Iowa that the fact that the superior agent has charge of the subordinate ones does not change the relation from that of fellow-servants, unless the superior has authority to hire and discharge subordinate servants. *Peterson v. Whitebreast, etc., Co.*, 50 Iowa, 673.

In *Blake v. Maine Central R. R. Co.*, 70 Maine, 60, the remark of the judge in *McAndrew v. Burns*, 39 N. J. 117, that "a fellow-servant I take to be any one who serves and is controlled by the same master," was approvingly quoted, and it was held that the principle applied although one servant was subordinate to the other. The Supreme Court of Pennsylvania has held, in several cases, that the fact that one of the agents was a foreman having control of the other does not change the rule, and that they are, nevertheless, fellow-servants of a common master. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 438; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St. 374; *Keystone, etc., Co. v. Newberry*, 96 Pa. St. 246. This is the doctrine of the Court of Appeals of New York. *Wright v. New York Central R. R. Co.*, 25 N. Y. 562; *Crispin v. Babbitt*, 81 N. Y. 516.

The cases relied on by the appellant do not conflict with the views expressed in the cases cited by us. *Rogers v. Overton*, 87 Ind. 410, was not an action against the master, but was an action by one fellow-servant against another, and is, of course, not at all in point. *Boyce v. Fitzpatrick*, *supra*, affirms, in express terms, the general principle of the cases cited by us, but decides that the master is liable for a negligent failure to provide safe machinery. *Indiana Mfg. Co. v. Millican*, 87 Ind. 87, belongs to a class of cases essentially different from the present, for it decides, what is not here immediately involved, that a master is responsible if he negligently employs an incompetent servant, and thus causes injury to another servant. The decision in *Mitchell v. Robinson*, 80 Ind. 281, directly affirms the general doctrine as we have stated it in the early part of this opinion, but declares that where the agent stands in the place of an absent master, the master is liable for his negligence in performing duties which the law requires of the master. There is, therefore, no conflict in our cases, and they have a full and firm support from the decisions of other courts.

The rules which these decisions so firmly establish as the law of this State may be thus stated:

First. The master is not liable to a servant for injuries resulting from the negligence of a fellow-servant engaged in the same general line of duty, where the negligent act is performed in the capacity of servant.

Second. Servants engaged in the same general line of duty are fellow-servants although one may be a superior and the others may be subordinate servants, under his immediate direction and control.

The facts which it is necessary to consider in connection with the rules of law stated are these: The appellant is a foreign corporation, with its chief officers and agents in another State; it owned and operated a car manufactory at Cambridge City, in this State; this factory was under the general control and management of John McCrie; the wood shop in which the appellee was injured, and where he was employed, was under the immediate control of John Higginson, as foreman.

It is obvious that the rules of law will preclude the appellee from recovering upon the ground that the foreman, in the discharge of his duties as foreman, was guilty of negligence. While Higginson was acting merely as foreman, and not discharging a duty owing by the master to its servants, he

was the fellow-servant of the appellee. The duties of his position as foreman did not make him anything more than a co-employee, with a higher rank and greater authority than the appellee, and so long as he kept within the line of his duties as foreman he was a fellow-servant, serving a common master. If the negligence which caused the injury occurred while Higginson was engaged in the performance of the duties imposed upon him as an employee in the same general line of service with the appellee, the employer is not liable, because the liability to injury from the negligence of a fellow-servant is one of the risks of the service which the servant assumes in entering upon it. The servant does not assume any risk arising from a breach of duty by the master, but does assume the risk of a breach of duty by his co-servants. It is clear that counsel's theory, that the appellee is entitled to recover on the ground that the foreman was guilty of negligence in the performance of his duty as foreman, cannot be maintained, and if there is no other ground upon which the appellee can plant his right to a recovery this appeal must be sustained.

It is the duty of the master to provide suitable and safe machinery, reasonably well adapted to perform the work to which it is devoted, without endangering the lives or limbs of those employed to operate it. The master is not bound to use the highest care, nor to secure the latest and most improved machinery, but he is bound to use care, skill, and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to a servant injured by the omission. *Umbach v. Lake Shore, etc., R. R. Co.*, 8 Am. & Eng. R. R. Cas. 98; *Boyce v. Fitzpatrick, supra*; *Lake Shore, etc., R. R. Co. v. McCormick*, 5 Am. & Eng. R. R. Cas. 474; *Lawless v. Connecticut River R. R. Co.*, 18 Am. & Eng. R. R. Cas. 96; *Trask v. California, etc., R. R. Co.*, 11 Am. & Eng. R. R. Cas. 192; *Payne v. Reese*, 100 Pa. St. 301; *Hough v. Railroad Co.*, 100 U. S. 218; *Railroad Co. v. Fort*, 17 Wall. 553; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 241; *Paterson v. Wallace*, 1 Macq. 748; *Corcoran v. Holbrook*, 59 N. Y. 517; *Ellis v. New York, etc., R. R. Co.*, 17 Am. & Eng. R. R. Cas. 641; *Wilson v. Willimantic, etc., Co.*, 50 Conn. 438; *Vosburgh v. Lake Shore, etc., R. R. Co.*, 15 Am. & Eng. R. R. Cas. 249; *Wood, Master and Servant*, 686; 2 *Thomp. Neg.* 972; *Whart. Neg.* section 211.

The duty which the master owes to the servant is one which he cannot rid himself of by casting it upon an agent, officer, or servant employed by him. The distinction between a negligent performance of duty by an agent or servant, and the negligent omission of duty by the master himself, is an important one. Where the duty is one owing by the master, and he entrusts its performance to an agent, the agent's negligence is that of the master. As the master is charged with the imperative duty of providing safe and suitable appliances, this duty he must perform, and if he entrusts it to an agent, and the agent performs it in his place, the agent's act is that of the master. In authorizing an agent to perform such an act, the principal is, in legal contemplation, himself acting when the agent acts, for he who acts by an agent acts by himself. This principle does not conflict with any of the general rules we have stated, for the agent assumes, by authority, the master's place, and does what the law commands the master to do. He is for the occasion, and in the eyes of the law, the master. If it be true that the agent's act is the master's act, then it must be true that the negligence involved in the act is that of the master himself. The rule which absolves the master from liability for the negligence of the fellow-servant has no application whatever where the agent stands in the master's place. The reason of the rule fails; and where the reason fails, so does the rule itself. The reasons which support the rule are that servants take the risks of the employment upon which they enter, and that public policy requires that fellow-servants should "each be

an observer of the conduct of the other." *Farwell v. Boston, etc., R. R. Co.*, 4 Met. (Mass.) 49.

The first of these reasons completely fails when it is brought to mind that the servant does not assume the risk arising from unsafe and unsuitable machinery and appliances. The second as surely and completely fails when we affirm, as under all the authorities affirm we must, that the duty to provide safe appliances rests upon the master, and not on any servant, for, surely, servants are not bound to be observers of the master's conduct. It is, therefore, not at all difficult to clearly discriminate and broadly mark the difference between a case where it is the master's duty, as master, that is neglected, and a case where it is the fellow servant's duty, as servant, that is negligently performed. A servant has a right, himself exercising ordinary care, to rely upon his master's care and diligence. He is not bound to watch his master as he is his fellow-servant. The rights are reciprocal: the master has his duty as the servant has his. When the master's duty is negligently done, he it is who is guilty of a breach of duty although he acted through the medium of an agent. If the master were permitted to escape his duty by shifting it to an agent, the practical result would be his entire absolution from the duty which the law imposes. The law will not permit this result, for it will not permit a duty to be evaded, but will require performance by the person upon whom it has fixed it. A different rule from that stated would, in such a case as this, wholly relieve the master from obligation to his servants, for here the foreign corporation acted by its agents, and none of its chief officers were ever at the factory in Cambridge City. If it cannot be held responsible for the negligence of these agents in selecting, arranging, and maintaining this machinery, the result will be that it is wholly absolved from its duty to its agents and servants.

It is clear, upon principle, that where the duty rests directly on the master, and he authorizes an agent or servant to perform that duty, he is bound to answer to a servant injured by the negligent performance of the duty; nor are authorities wanting. In one of our text-books it is said: "It is important at this point to remember that the master is liable where the negligence of the offending servant was as to a duty assumed by the master as to working-place and machinery. A master, as we have already seen, is bound when employing a servant, to provide for the servant a safe working-place and machinery. It may be that the persons by whom outbuildings and machinery are constructed are servants of the common master, but this does not relieve him from his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capital to labor, could be evaded by the capitalist employing only his own servants in the construction of his buildings and machinery." *Wharton Neg.*, section 232.

In a thoughtful essay upon this general subject, Judge Cooley says: "We have seen that in some cases the master is charged with a duty to those serving him which he cannot divest himself of by any delegation to others. He is charged with such a duty as regards the safety of his premises, the suitability of the tools, implements, machinery, or materials he procures or employs, and the servants he engages or makes use of. Whoever is permitted to exercise the master's authority in respect to these matters is charged with the master's duty, and the latter is responsible for a want of proper caution on the part of the agent, as for his own personal negligence." 2 *Southern Law Rev.*, N. S. 114, see page 123.

In *Mullan v. Philadelphia, etc., Co.*, 78 Pa. St. 25, the court said: "In this case there was some evidence that the entire duty of providing the appliances for loading and unloading the vessels of the defendants had been entrusted to the discretion of Corcoran. And just to the extent to which the proof went in fixing upon him the responsibility for the selection of the rigging and for

adjusting and working it, did the same proof tend to establish the fact contended for by the plaintiff, that Corcoran was clothed, as to these duties, with the ultimate power and authority of the defendants." It was held in the case of *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; s. c., 44 Am. R. 573, that where a superintendent was employed to secure and keep the machinery of a factory in repair, and by his negligence in the performance of that duty caused an injury to a servant in the same general line of employment, the master was responsible. The court said: "So, too, it is conceded to be the duty of the master to provide suitable machinery for the use of his operatives; and if he delegates this duty to another, he is responsible to his servant for any injury caused by the negligence of any person to whom the performance of this duty has been entrusted." In *Crispin v. Babbitt* 81, N. Y. 516, the court stated the general principle that "the liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury," and then proceeded thus: "On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master which he has confided to such inferior employee. On this principle *Flike v. Boston, etc., R. R. Co.*, 53 N. Y. 549, was decided. Church, C. J., says, at p. 533: 'The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent entrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed.'" In *McCosker v. Long Island R. R. Co.*, 84 N. Y. 77; s. c., 5 Am. & Eng. R. R. Cas., 564, the same principle is recognized and enforced. The rule is thus expressed by another court: "The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptance of those terms." *Brothers v. Cartter*, 53 Mo. 372.

In another case it was said: "As to the acts which a master or principal is bound as such to perform toward his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed." *Corcoran v. Holbrook*, 59 N. Y. 517.

Speaking of the duty of the master to the servant, the Supreme Court of the United States said: "Its duty in that respect to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees." *Hough v. Railroad Co.*, 100 U. S. 213, 218; *Wabash, etc., R. R. Co. v. McDaniels*, 107 U. S. 454; s. c., 11 Am. & Eng. R. R. Cas. 158.

One of the first of the American courts to adopt and develop the doctrine that a master is not liable to a servant for the negligence of a fellow-servant, and a court that has with as much sternness as any in the land enforced the doctrine, says: "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the

convenience of the master may require." *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240. The general principle, that where the master entrusts to a servant a duty which he himself owes to those employed by him, he is liable for a negligent discharge of that duty, is also involved, and necessarily decided, in the cases of *Mitchell v. Robinson*, 80 Ind. 281; and *Ohio, etc., R. R. Co. v. Collarn*, 78 Ind. 261, *vide* p. 278; s. c., 5 Am. & Eng. R. R. Cas. 554.

The duty of the employer to provide safe machinery and appliances is a continuing one. Thompson says: "But the master does not discharge his duty in this regard by providing proper and safe machinery, or fit servants, in the first instance, and then remaining passive. 'It is a duty to be affirmatively and positively fulfilled and performed.' He must supervise, examine, and test his machines as often as custom and experience require." 2 Thompson Neg. 984. In support of this doctrine the author cites *Warner v. Erie, etc., R. R. Co.*, 39 N. Y. 468; *King v. New York Central, etc., R. R. Co.*, 4 Hun, 769; *Shanny v. Androscoggin Mills*, 66 Maine, 420; *Laning v. New York Central R. R. Co.*, 49 N. Y. 521; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Lewis v. St. Louis, etc., R. R. Co.*, 59 Mo. 495; *Chicago, etc., R. R. Co. v. Swett*, 45 Ill. 197; *Illinois Central R. R. Co. v. Welch*, 53 Ill. 183; *Goheen v. Texas, etc., R. R. Co.*, 3 Cent. L. J. 382. This is the doctrine of the Supreme Court of the United States, as appears from the decision in *Hough v. Railway Co.*, *supra*.

In *Gunter v. Graniteville, etc., Co.*, *supra*, it was said: "It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives; and, we think, it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and in safe working order; and if these duties, or either of them, are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have entrusted the performance of such duties to subordinates, by whatever name they may be called." In support of this doctrine the court refers to the cases of *Corcoran v. Holbrook*, 59 N. Y. 517; *Brann v. Chicago, etc., R. R. Co.*, 53 Iowa, 595; *Fuller v. Jewett*, 80 N. Y. 46; s. c., 1 Am. & Eng. R. R. Cas. 109. The rule is supported by sound principle. The duty of the master is not at an end when he first equips his factory or mill, but continues as long as there are operatives who are entitled to assume that he will use due care to provide safe machinery and appliances. It would overthrow the rule, that the risks which a servant assumes are only such as are incident to the use of machinery selected and maintained by the master with proper care, to deny the validity of our conclusion.

Ordinary care requires that a master shall take notice of the liability of the parts of the machinery to decay from age or wear out by use. *City of Indianapolis v. Scott*, 72 Ind. 196; *Board, etc., v. Legg*, 93 Ind. 523; *Board, etc., v. Bacon*, 96 Ind. 81; *Rapho v. Moore*, 68 Pa. St. 404. It certainly needs no argument to prove that a factory-owner must know that a rope, or materials of a similar character, will wear out, and that he has no right to assume that wear and use will not weaken or impair them. Ordinary prudence, therefore, requires that he should take notice of the liability of such things to wear out, and make provision for such contingencies. Reason and experience unite in affirming that an owner does not exercise even ordinary care who gives no attention to the effect upon ropes, belts, timbers, or the like, which is produced by the wear of continued use. It would be unreasonable to assert that an owner might entirely disregard the tendency of parts of his machinery to wear out, and intrench himself from liability on the ground that at the outset he had provided safe machinery and appliances.

We have ascertained the general principles which rule such cases as this, and it remains to ascertain whether they were correctly applied to the facts of this case. The appellee, on the morning that he was injured, received an



order from Higginson, the foreman under whose immediate control he was, to run what was called the cut-off saw; this saw was a circular one, and worked through a groove in a table. The rope which held the saw back from the table, and in a great measure controlled its operation, broke, and the breaking of this rope caused the injury. The evidence shows that the rope was unsuitable, defective, and unsafe, and there is also evidence tending strongly to show that the foreman had notice of its condition prior to the morning the injury occurred. One of the appellee's fingers was cut off, another was badly injured, his thumb was also much injured, his hand was split open to the wrist, his wrist and hand rendered stiff, and its serviceableness much impaired. He was confined to his bed for some time, abscesses formed, several bones were extracted, and he suffered great pain. He expended for medicine and surgical attention \$144.

The court did not err in instructing the jury that the appellant was responsible for the negligence of an agent appointed by it to act in its place in purchasing and maintaining machinery upon which the duties of the appellee required him to work. Nor did the court err in refusing the instructions asked by the appellant, asserting that if the appellant had employed a competent superintendent it was not liable although the machinery was unsafe. It was the duty of the corporation to provide and maintain, so far at least as ordinary diligence could do, machinery safe and suitable for the purposes for which it was used, and the court was right in instructing the jury to that effect. We do not think the appellant has just reason to complain of the ninth instruction, which informs the jury that if the exercise of ordinary diligence on the part of the defendant would have surprised it of the defective condition of the rope, and it negligently allowed the rope to become worn and insecure, the plaintiff, if free from contributory negligence would be entitled to recover. This instruction, taken, as it must be the connection with the others, was at least as favorable to the appellant as it had a right to ask. The doubt is, whether, under the authorities, the master is not held to more than ordinary diligence in such matters; but, however this may be, the least degree of diligence to which he is held by any case is ordinary diligence.

In computing damages in such a case as this, it is proper to consider the pain and suffering endured by the injured person, the expenses incurred for medical attention, the character of the injury, whether temporary or permanent, and its effect upon the ability of the person injured to earn money or pursue his trade or profession. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Wright v. Compton*, 58 Ind. 387; *Cox v. Vanderkleed*, 21 Ind. 164; *Taber v. Hutson*, 5 Ind. 322; *Fisher v. Hamilton*, 49 Ind. 341. In this class of cases, exemplary damages cannot be awarded, but full compensatory damages may be given. It is said in a text-book of excellent repute that "in an action for negligent injury to the person of the plaintiff, he may recover the expense of his cure, the value of the time lost by him during his cure, and a fair compensation for the physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money." *Shear. & Redf. Neg.*, section 606. The court approved an instruction substantially like the one now before us in *Pittsburgh, etc., R. R. Co. v. Sponier*, 85 Ind. 165; s. c., 8 Am. & Eng. R. R. Cas. 458; and in *City of Huntington v. Breen*, 77 Ind. 29. In *City of Indianapolis v. Scott*, 72 Ind. 196, an instruction in almost the exact language of the one under immediate mention was approved.

We think the complaint sufficiently shows that the appellee suffered special damages, for it describes the injury and avers that the "plaintiff's right hand has been permanently injured and ruined, and rendered unfit for use and labor."

It is a settled rule of law that courts will not disturb a verdict on the ground of excessive damages unless they are, as said by Chancellor Kent, so "outrageous as to strike every one with the enormity and injustice of them,

and so as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption." *Coleman v. Southwick*, 9 Johns. 45. This doctrine has often been enforced by this court. *Ohio, etc., R. R. Co. v. Collarn, supra*; *Yater v. Mullen*, 23 Ind. 562; *Alexander v. Thomas*, 25 Ind. 268; *Reeves v. State*, 37 Ind. 441; *Hoagland v. Moore*, 2 Blackf. 167; *Guard v. Risk*, 11 Ind. 156. In a recent text-book a like doctrine is laid down and many authorities are cited. *Hayne, New Trials*, section 95.

Judgment was affirmed, when a petition for a rehearing was filed.

Elliott, J., again decided the case. He said: An able brief has been filed on the petition for rehearing, but the principal questions decided are not again discussed, counsel saying: "The view taken in the opinion, however, has such strong reasons to support it that we shall not ask the court to reconsider it."

Ninety-five reasons were stated in the motion for a new trial, and it is now complained that we did not consider all of the questions presented. We did decide all of the main questions and such as counsel fully argued, but it is perhaps true that we did not expressly decide some minor ones, although those decided really rule the case.

The question upon the evidence as to whether Parker was or was not guilty of contributory negligence was one of fact for the jury, and not of law for the court; and as there was evidence satisfactorily supporting the verdict, we must leave it undisturbed. There are, no doubt, cases where the court will determine the question of contributory negligence, but this is not one of them. Whether Parker could have seen the defect, and whether it was such as ordinary prudence and vigilance would have enabled him to guard against, were questions of fact. Descriptions of the defect were given by the witnesses, and it is impossible for the court to say, as matter of law, that he could by exercising ordinary prudence have seen it and avoided injury. It certainly was not one open to observation, and, besides this, one of the superior agents of the corporation—its chief representative, in fact—had ordered him to work upon the machinery, and we cannot perceive any reason for taking the case from the jury. *Baker v. Allegheny Valley R. R. Co.*, 95 Pa. St. 211; s. c., 8 Am. & Eng. R. R. Cas. 141. It is quite clear that it would have been error for the trial court to have instructed the jury to find for the appellant, and it follows that this court cannot interfere. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Louisville, etc., R. R. Co. v. Richardson*, 66 Ind. 46; *City of Washington v. Small*, 86 Ind. 462, p. 469; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346; s. c., 18 Am. & Eng. R. R. Cas. 234; *Pennsylvania R. R. Co. v. White*, 88 Pa. St. 327; *Willard v. Pinard*, 44 Vt. 34; *Robson v. Northeastern R. W. Co.*, L. R., 10 Q. B. Div. 271; *Curtis v. Detroit, etc., R. R. Co.*, 27 Wis. 158; *Hutch. Car.* 615. In such cases as this the question must, under proper instructions, be left to the jury as one of fact.

We recognize and approve the general rule that a servant who continues in the master's employment with full knowledge of the risk cannot recover for injuries received. *Umbach v. Lake Shore, etc., R. R. Co.*, 83 Ind. 191; s. c., 8 Am. & Eng. R. R. Cas. 98; *Lake Shore, etc., R. R. Co. v. McCormick*, 74 Ind. 440; s. c., 5 Am. & Eng. R. R. Cas. 475. But that rule does not apply here. There is no such evidence as warrants the assumption that the appellee knew of the defective condition of the machinery, or that it was such as to subject him to any extraordinary risks. The jury by their general verdict, and also in answer to interrogatories, explicitly negative the existence of knowledge. It would be a palpable violation of long-settled rules to set aside the conclusion of the jury upon the evidence as it comes to us.

A single interrogatory is selected by appellant, and upon that a judgment is demanded. This demand cannot be heeded, for the answer is not such as controls, and it is only where the single answer is of controlling force that

the general verdict will be set aside. This has been again and again decided. *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412, *vide* pp. 417, 418, and cases cited; *Hereth v. Hereth, ante*, p. 85. Besides, it has been very frequently decided that answers to interrogatories will not control the general verdict, unless there is an irreconcilable conflict, and here there is no such conflict. But if we are wrong in applying these rules, still the appellant can not succeed, for all that appears in the answer is that one of the superior agents of the corporation, the one in charge of the shop where appellee worked, had knowledge of the defect, and it is quite clear that his knowledge would not conclude the appellee. *Atlas Engine Works v. Randall, post*, p. 298. Even if Higginson, the foreman, had been a mere fellow-servant in the same line of employment with Parker, instead of a foreman having full authority over him, it is doubtful whether knowledge on the part of Higginson would have concluded Parker.

We do not think it can be said as a matter of law that a workman is guilty of negligence who changes from one part of his work to another at the command of the agent set over him by the master. *Rogers v. Overton*, 87 Ind. 410. Here there was no change from one shop to another, no change from one branch of business to another, but only a change in the same shop from one piece of machinery to another, and we can perceive no reason for holding the servant guilty of contributory negligence in making such a change pursuant to the orders of his superior. It would be unreasonable to require servants to disobey the orders of a superior agent under such circumstances. A prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior. *Atlas Engine Works v. Randall, supra*; *Rogers v. Overton, supra*. There may, perhaps, be cases where it would be contributory negligence to change positions, as, for instance, where the change is made to a branch of business with which the servant is unacquainted; but this is not such a case, for here the superior agent had authority to give orders, had charge of the branch of business in which the servant was employed, and the change did not take the servant out of the line of his employment. *Dowling v. Allen*, 74 Mo. 13; *Cone v. Delaware, etc., R. R. Co.*, 81 N. Y. 206; *s. c.*, 2 Am. & Eng. R. R. Cas. 57; *Cowles v. Richmond, etc., R. R. Co.*, 84 N. C. 309; *Ryan v. Bagaley*, 50 Mich. 179; *Corcoran v. Holbrook*, 59 N. Y. 517; *Luebke v. Chicago, etc., R. W. Co.*, 59 Wis. 127, 15 Am. & Eng. R. R. Cas. 183; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148.

In the course of his testimony, and in explaining the character of his injury, the appellee exhibited his injured hand to the jury. There was no substantial error in permitting this to be done. Wharton says: "Injury to the person may also be proved by inspection. Thus in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial." Whart. Crim. Ev., section 312. A great number of interesting cases are collected by him, all holding such evidence admissible. One among the most remarkable and amusing cases of this general character is that of *Thurman v. Bertram*, 20 Alb. L. J. 151, where a baby elephant was brought into one of the English courts. In his work on Trial Evidence, p. 599, Abbott says: "The injured member may be exhibited to the jury." An English author says that evidence afforded by inspection is of the highest character. 1 Taylor Ev., p. 513. By another English writer the same view is taken. Best Princ. Ev. 199. There has been much discussion as to whether a person accused of crime can be compelled to submit his person to the inspection of the jury, but it is agreed on all hands that instruments with which a crime was committed, the clothing of the accused or of the deceased, wounds and marks on their person, may be given in evidence. 15 Cent. L. J. 2 and 209; 22 Alb. L. J. 145; *Rogers Exp. Tes.* p. 104.

Our own decisions have, in a great variety of cases, recognized the right to submit to the jury persons and things for inspection. *Fleming v. State*, 11 Ind. 234; *Story v. State*, 99 Ind. 418; *Short v. State*, 63 Ind. 376; *McDonel v. State*, 90 Ind. 320, *vide* p. 328; *Beavers v. State*, 58 Ind. 530. Perhaps the most numerous class of cases in which the right of the jury to inspect a thing has been discussed is that in which the genuineness of written instruments has been involved, and it has been uniformly held that it is competent for the jury to make such inspections, and that they may be aided by magnifying-glasses. *Lawson Exp. and Opinion* Ev. 415.

The case of *Stephenson v. State*, 28 Ind. 272, does not touch the question here involved, as is evident from the statement of the court, for that statement shows that no evidence at all was offered, the trial judge holding that as the defendant was in court there was no necessity for any evidence, as he could determine the defendant's age from his appearance. The case of *Ihinger v. State*, 58 Ind. 251, decides that an instruction given by the court was erroneous for the reason that it made the case turn entirely upon the personal appearance of the party rather than upon the testimony of the witnesses. The decision in *Robinius v. State*, 63 Ind. 235, does go further, and holds that the court trying the case has no right to take into account the personal appearance of the accused in determining the question of his age. Conceding the correctness of this decision, although it has been strongly assailed as requiring a judge to disregard the evidence of his own senses, still there is a distinction between such a case and the present, for where age is the material question, as it was in the case cited, the decision upon inspection really determines the whole case; while, in such a case as the present, the inspection of the wounded member simply illustrates and makes clear the testimony of the party, and assists in determining the character of one of the facts in the case. There is still another distinguishing feature, and that is this: in the present case the question is not as to the effect of the exhibition of the wounded hand; while in the case cited the question was entirely as to the force and effect of the inspection of the person of the accused.

All that we are now required to decide is, whether it was substantial error to allow the appellee to exhibit to the jury in the course of his testimony his wounded hand; we are not required to determine whether the result of such an exhibition can be deemed evidence in the strict sense of the term, or what force and effect should be ascribed to it, if regarded as evidence.

**Corporations—Liability of, for Tortious Acts of Servants.**—Corporations are liable for the acts of their agents and employees in the same manner and to the same extent as private persons. Accordingly, the employees of a railroad corporation, who are engaged in service at its stations or on its trains, are presumed to be authorized by it to do such service and to perform the acts usually incident to their position; and the corporation is liable for their tortious acts which are performed in the course of such service. *Denver, S. P. & P. R. R. Co. v. Conway*, \*Colorado, December, 1884.

**Servant Injured by Co-servant—Master not Liable.** Pleading.—A master is not liable in damages to a servant for injuries resulting from the negligence of a fellow-servant engaged in the same general employment, unless he has been guilty of negligence in the employment of, or, after notice, continues in his employment, the negligent or incompetent employee through whose negligence the injury was caused, and such negligence on the part of the master must be averred in the complaint. *Bogard v. Louisville, E. & St. L. R. R. Co.*, \*100 Indiana, 491; citing *Indiana Car Co. v. Parker*, *Idem*, 181; *Ohio, etc., R. R. Co. v. Collarn*, 5 Am. & Eng. R. R. Cas. 554; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Brazil, etc., Co. v. Cain*, 98 Ind. 283.

## CAPPER

v.

LOUISVILLE, EVANSVILLE AND ST. LOUIS R. R. Co.

*(Advance Case, Indiana. October 17, 1885.)*

Where one employed by a railroad company to work in a tunnel was ordered by the superintendent of the work, under threat of dismissal, to get on a freight train for transportation to another tunnel, and in doing so he was violently cast on the ground and injured by the negligence of the engineer in starting the train, the company is not liable.

A command, accompanied by a threat, is a command to which an employee is not bound to submit; under the contract of service, such command does not take the plaintiff out of the general line of his employment, and having received his injury through the negligence of his fellow-servant engaged in the same general employment, the master is not liable.

APPEAL from the Floyd Circuit Court.

The facts are sufficiently stated in the opinion.

*F. Staff and Ferriss, Spencer & Ferris* for appellant.

*Adams & Michener* for appellee.

ELLIOT, J.—The material allegations of the appellant's complaint are these: "Prior to the 7th day of February, 1883, the plaintiff, being a laborer, entered into the service of the defend- FACTS.

ant to work and assist at removing loose and projecting pieces of stone from the side and roof of a tunnel, and to place in the tunnel timbers and frames for bracing and supporting the sides and roof thereof; in the doing of all of which the plaintiff acted under the command and directions of one James O'Hara, who was the person appointed by the defendants as the general superintendent of the said work and the laborers engaged therein. On the 7th day of February, 1883, while engaged about his work at the said tunnel, he, with other laborers, was directed and ordered by James O'Hara, under a threat of discharge if he disobeyed, to get upon a freight train of the defendant's and go to another tunnel near Georgetown to work. The freight train was not stopped to allow the plaintiff to embark thereon, but was running slowly, so that plaintiff might safely have gone upon the steps and into the car but for the negligence and carelessness of the defendant's servants who were in charge of the said train. James O'Hara directed the plaintiff to get upon said train while it was moving, slowly as aforesaid, and the plaintiff, in obedience to said order and using due care to prevent accident or injury, attempted so to do, and for that purpose took hold of the iron rod, or hand-rail, at

the rear of the car into which he was directed to go, and started to get upon the steps of said car; but the plaintiff says that at that instant the engineer and servants of the defendant in charge of the engine which was moving said car along the track, without warning the plaintiff of their intention so to do, violently forced said car forward with great violence, causing the same to violently jerk the plaintiff, by the force and violence of which his hold was loosened from the iron rod and he was thrown under the car and his foot run over and crushed."

The appellee contends that the trial court rightly decided that the complaint was bad, for the reason that it appears that the injury to the plaintiff was caused by the negligence of a fellow servant. The appellant, on the other hand, contends that the ruling of the trial court was wrong, because the servants of the appellee, whose negligence caused the injury, were not in the same general line of employment.

The allegations of the complaint do not bring the case within the cases holding that where a servant is transferred by command of his superior to a line of service different from that which he undertook when he entered the service of the master, he may maintain an action against the master for injuries received while engaged in the work to which he was transferred.

Such decisions as those in *Lalor v. Chicago, Q. & B. R. R. Co.*, 52 Ill. 401; *U. P. R. R. Co. v. Fort*, 17 Wall, 553; *Chicago & N. W. R. R. Co. v. Bayfield*, 37 Mich. 205; *Hurst v. Chicago*, 49 Iowa, 76, and *Mann v. Oriental P. Wks.* 11 R. I., 152, do not in any event rule this case, and we need not and we do not enter upon any examination of the doctrine which they maintain. The complaint before us does not aver that the appellant engaged in the service of the company to do a particular work, or pursue a designated line of service from which he was wrongfully transferred. It does not appear that the command of the superintendent was not one which the duties of this appellant's employment required him to obey. For anything that appears, the command to go from one tunnel to another was one which the superintendent had a right to give and to which the engagement of the appellant required him to yield an obedience. It is true that the complaint avers that the command of the superintendent was given under a threat of discharge, but this is by no means equivalent to averring that the command took the appellant out of the general line of his employment, or, that it was one to which he was not bound to submit under his engagement in the service of the company. It cannot be presumed that either the master or the superior agent violated a duty and disregarded the rights of the appellant. A plaintiff who founds a cause of action upon a breach of duty must state such facts as show the duty and its violation.

It may now be taken as settled in this State, that where a master

delegates duties which the law imposes upon him to an agent, the agent, whatever his rank, in performing that duty acts as the master. *The Indiana Car Co. v. Parker*, 100 Ind. 181, and authorities cited; *Atlas E. Wks. v. Randall*, Id. 293. The case relied on by the appellant, Ohio, etc., *R. R. Co. v. Collarn*, 5 Am. & Eng. R. R. Cas. 554, rests on this principle.

In that case the railroad company was held liable on the ground that the master mechanic whose negligent breach of duty caused the injury, was not a fellow-servant, but in the discharge of the duties cast upon him was acting for the master and stood in his place.

The complaint under examination does not state facts showing that the superintendent, O'Hara, acted in the master's place; on the contrary, it states such facts, and only such facts, as show that the so-called superintendent was nothing more than the foreman in charge of the particular work in which the appellant was employed.

In the case of the *Indiana Car Company v. Parker*, *supra*, a great number of cases were collected from which it appears that the rule has been long and firmly established, that for the negligence of a foreman, or other like agent, the master is not liable to a servant engaged in the same general service. It is not necessary to again review the cases or investigate the subject, for the rule is too well established to be now shaken, that a foreman, except where the master's duties are delegated to him, is a fellow-servant with those under his immediate supervision, and that for the negligence of a fellow-servant an action will not lie against the common master.

This case is that of a servant engaged in the work of constructing and repairing tunnels upon the line of the railroad, and receiving an injury while being carried from one point to another upon the line of his employer's road. The decisions of our court are, that one who is employed to do work upon the track of a railroad is a co-servant with the engineer and others in charge of the train that carries him to and from his work. *Ohio & Miss. R. R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. Madison*, etc., *R. R. Co.*, 18 Ind. 226; *Slattery's Admr. v. Toledo R. R. Co.*, 23 Ind. 81; *Thayer v. St. L., A. & T. H. R. R. Co.*, 22 Ind. 26; *Ohio & M. R. R. Co. v. Hammersley*, 28 Ind. 371; *Gormley v. Ohio & Miss. R. R. Co.*, 5 Am. & Eng. R. R. Cas. 581. It is not possible to distinguish in principle between the cases we have cited and the present one, for it cannot make any difference whether the servant was employed to repair tunnels, relay rails, replace ties, or spread gravel in ballasting the track, and this case must fall within the rule declared in those cases. The authorities are very numerous in support of the doctrine maintained by our decisions, and among the cases upon this subject are: *O'Brien v. Boston Co.*, 19 Rep. 462; *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. 228; *Rus-*

sell v. Hudson R. R. Co., 17 N. Y. 134; Holden v. Fitchburg R. R. Co., 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94; Roberts v. R. R. Co., 22 N. W. Rep. 389; Manville v. Cleveland & T. R. R. Co., 11 Ohio St. 417; Keystone B. Co. v. Newberry, 96 Pa. St. 246; s. c., 42 Am. Rep. 543; Vick v. N. Y. R. R. Co., 95 N. Y. 267; s. c., 17 Am. & Eng. R. R. Cas. 609; Thompson v. Chicago, 18 Fed. Rep. 239; Pa. R. R. Co. v. Wachter, 60 Md. 395; s. c., 15 Am. & Eng. R. R. Cas. 187; Dallas v. Gulf Co., 61 Texas, 196; Trougear v. Lower Vein Coal Co., 62 Iowa, 578; Brown v. Minn. & St. L. R. R. Co., 31 Minn. 553; s. c., 15 Am. & Eng. R. R. Cas. 333; Hane v. Chicago Co., 62 Wis. 525; Chicago & N. W. R. R. Co. v. Moranda, 93 Ill. 302; s. c., 17 Am. & Eng. R. R. Cas. 564; Cunningham v. International R. R. Co., 51 Texas, 503.

The doctrine is now so well settled, and has so long prevailed, that we cannot depart from it, although if it were an open question some of us would be inclined to a different view.

Our conclusion is, that the complaint is bad because it shows that the negligence which caused the plaintiff's injuries was that of a fellow-servant

Judgment affirmed.

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## CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA R. R. Co.

v.

LUNDSTROM, Admr.

(16 *Nebraska Reports*, 254.)

The power and franchise of the plaintiff in error to take by purchase, own, and operate the railroad in question is derived from the provisions of the act of March 1, 1881, entitled "An act authorizing the sale and purchase of railroads in certain cases," and the plaintiff in error is bound by the provisions of said act.

The word indebtedness, as used in the first section of the act above referred to, was intended to and does mean and embrace all debts and demands against the selling company or railroad upon which a suit could be maintained either at law or in equity.

A conductor of a construction train on a railroad, with a gang of men engaged to work as day laborers for the railroad company but under the immediate orders of such conductor, is, as to such men, the vice-principal of the railroad company and not a fellow-servant of such men. And an act of gross negligence on the part of such conductor, whereby the lives of such men are placed in jeopardy while working under his immediate orders and direction, and one of them is killed, is the negligence of the company, for which it is liable.

In a proceeding on error to a district court this court can only consider such points as have been brought to the attention of the district court, and a



ruling had or demanded thereon, and it is such ruling or refusal to rule by the district court upon which this court can act.

The courts of this State have jurisdiction of civil actions co-extensive with the boundaries of the State.

**ERROR** to the district court for Burt County. The action was brought there by Lundstrom to recover damages on account of the death of his intestate occurring in the manner stated in the opinion. The accident occurred while the deceased was in the employ of the St. Paul & Sioux City Railroad, who had disposed of its road to the defendant below prior to bringing of this action. Trial below before Wakeley, J., and a jury, with verdict and judgment for plaintiff of \$5,000 and costs. Defendant railroad company brought the cause here on a petition in error.

**CORB, C. J.**—I heard the argument at the bar and have read the exhaustive briefs of counsel on the part of plaintiff in error with great interest, and particularly upon the first point as to the liability of the plaintiff in error upon a cause of action primarily existing against the Sioux City Railroad Company, and whether the allegations of the petition of plaintiff in the court below are sufficient to charge that liability upon the plaintiff in error; and while I admit the force of the argument and that the logic of the briefs is well nigh irrefragable, yet I do not think it possible that the state of our laws has been such as to permit a foreign corporation to own and operate a railroad in this State, contract debts and incur obligations, and whenever it suited the pleasure of its stockholders or officers, sell out all of its property and franchises,—its very existence so far as this State is concerned,—and leave its property and franchises within our borders freed from such debts and obligations, and in the possession of another foreign corporation lacking only the motive and the opportunity to do the same thing. All the provisions of law previous to the act of 1881 (Comp. Stat., chap. 72, art. IV.) providing for the sale of railroads within this State, provided for their sale to corporations organized under the laws of this State, or to individuals contemplating organizing under the incorporation laws of this State, and provides that the contracts and agreements made by any such railroad company, prior to such transfer, should be binding upon the new owners.

I think it clear that under none of these provisions could the plaintiff in error have legally become the purchaser of the railroad in question. As is well said by counsel in the brief, it was the policy of this State to invite foreign corporations to extend the lines of their roads to our borders and build railroads in our State, but they never were invited to buy out railroads already built, nor permitted to do so by law until the act of 1881; and although the

DUTIES OF FOREIGN CORPORATION BUYING RAILWAY.

deed of sale of the railroad in question bears date twenty-one days earlier than the taking effect of the statute of 1881, yet it was evidently made in view of the provisions of that act, and of its becoming the law of the land at an early day thereafter; and if the plaintiff in error has the right and franchise to own and operate a railroad within the State of Nebraska to-day, it derives that right from the provision of the act of 1881. Holding its very existence within our State under that act it is bound by its provisions. Among those provisions are the following: "The purchase [purchaser] of any such railroad shall be subject to any and all laws [liens], incumbrances, or indebtedness existing against the railroad company from which such road may be so purchased." The word indebtedness is here used in its large and general sense, and not in a technical one. Its primary definition as given by Webster to the word indebted: Placed in debt; being under obligation; held to payment, or requital; beholden.

The plaintiff in error then took the railroad in question charged with the payment of any just claims which were outstanding against the road, or of its former owner as such, including that of defendant in error, or his decedent, if such claim be found just.

The second point made by counsel is upon the instructions given by the court to the jury on the trial. The instruction specially objected to and relied upon as error by plaintiff in error in its brief, was in the following language:

"Ordinarily, an action cannot be maintained by an employee of a person or corporation against the employer for an injury received through the negligence of another employee engaged in the same common service. . . . If you find that Carnes had control and direction of the men who were engaged in cleaning the track, and widening the cut through the snow at the place where the injury was received; that the men were bound by the terms of their service to obey the orders of Carnes; that at the time and under the circumstances it was attended with unusual and peculiar danger and hazard to work in the cut, on account of the approaching train; that Carnes knew this and had the power, authority, and means to cause timely warning to be given to the men of the proximity and approach of the train; that they expected and relied on him to do so; that he failed to do so; and in consequence thereof the deceased was run over and killed,—this was negligence for which the railroad company was responsible."

It appears from the bill of exceptions that the decedent of the defendant in error, the deceased, was engaged as a laborer in the employment of the railroad company. He was one of a gang of men attached to a construction train whose business at that season of the year was to clear off the accumulations of snow from the railroad track. One Carnes was the conductor of the train, and boss of the men and the work in which they were engaged. He

MASTER'S LIABILITY TO SERVANT INJURED BY CO-SERVANT.

had hired most or all of them to work for the company. On the morning of the day of the accident, this gang of men, consisting of fourteen men besides Carnes, the boss and conductor, left Oakland, and proceeded north with the train to Middle Creek Station, or turnout. Here, after placing the train on the side track, the conductor, with his gang of men, commenced working back south, clearing out the snow from the track. After completing this work through one cut of lesser dimensions, they entered the one where the fatal accident occurred. This is a cut of some four hundred feet in length, from ten to fifteen feet in depth in the centre, and gradually sloping to or near a level at each end. After working through this cut at what the witnesses call flanging, and describe as cleaning the snow off of the inner surface of the rails, and having arrived at the south end of the cut, the men were ordered by Carnes, the conductor and boss, to return to the centre of the cut, and widen the channel through the snow, which was barely wide enough to permit trains to pass. The sides of this channel were nearly or quite perpendicular, and the snow hard. A portion of the men had reached the centre of the cut, and commenced work widening the channel, and some of them had not yet arrived at that point, when some of the latter discovered a train of cars coming around a slight curve which exists at or near the north end of the cut. This proved to be the regular south-bound passenger train, about nine minutes behind time, and running at a speed of twenty-five miles per hour. Eight of the men nearest the south end of the cut, and Carnes, who was also near the south end, succeeded in getting out. Six men, who had got to work near the centre of the cut, including defendant in error's decedent, were run over and killed.

The questions then presented to this court by this branch of the case are, was the law correctly stated in the above instructions? and was it properly applicable to the facts as shown by the bill of exceptions? And they must both be answered in the affirmative.

The deceased was in the employment of the railroad company, in the lowest grade of service, a day laborer. To him Carnes represented the company with all of its authority and power. It was not for him to question the propriety or timeliness of any order coming from this source, unless its execution would carry him into palpable physical danger. Carnes, the conductor of the construction train, as well as boss of the gang of men, of course carried a watch, regulated by some standard of time common to the entire road. It was his duty, on whatever section of the road he might be with his train or gang of men, to know when any regular train was due at that point. The deceased, doubtless, carried no chronometer. Had he carried one it would have been regarded as an impertinence on his part to have claimed the right to regulate his work by it. So that, while it was his duty to go into NEGLIGENCE. the centre of the cut and go to work when ordered by Carnes, it

was gross negligence on the part of Carnes to order him there just as the train was due at that point. This was not only negligence on the part of Carnes, but it was negligence on the part of the railroad company whose vice-principal he was, and which could alone discharge its duty to this employee on this occasion through him.

It is not deemed necessary, nor does the time at my command admit of my going through and comparing the cases cited on either

**AUTHORITIES RE-  
VIEWED.**

side as to the right of a servant to recover from the master for injuries received by him through the negligence of an overseer or upper servant placed over him by the master. While I had supposed the law to be pretty well settled on this subject, the earnest claim of counsel at the hearing almost induced me to doubt whether the rule as formerly held in Ohio had not been departed from or essentially modified even in that State. But I find upon examination that such is not the case, and that that which is held in the case of *Little Miami R. R. Co. v. John Stevens*, 20 Ohio, 415, in 1851, is substantially held in all the cases up to and including *Railroad v. Lavalley*, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549. I think the rule is best stated by Judge Ranny in the case of *Railroad Co. v. Keary*, 3 Ohio St. 201, in the following language: "It seems to us clear in a case like the present, that as between the company and those employed to labor in subordinate situations under the control of a superior, two distinct classes of obligations arise, the one resting on the company, and the other upon the servants, and both founded upon what each, either expressly or impliedly, has agreed to do in the execution of the contract. It is the duty of the company to furnish suitable machinery and apparatus, and, as they reserve the government and control of the train to themselves, and intrust no part of it to these servants, to control it and them with prudence and care. As the necessity of this prudence and care is constant and continuing, the obligation is performed only when it is constantly exercised, and they cannot rid themselves of it by devolving this power upon the conductor. If they intrust him with its exercise, in the language of Judge Story, they in effect warrant his fidelity and good conduct. It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. If they fail to do this, and injure each other, they violate their engagements to the company, and are alone answerable for the wrongs they do. In such case there is no failure of the company to do what as between them and these servants it was understood they should do, when the servants entered the service. But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employers gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

I think the law thus established and laid down in Ohio prevails substantially throughout the Western States, and will ultimately prevail everywhere.

Plaintiff in error also makes the point in the brief of counsel that "There is error in the record arising from the abuse of the privileges of counsel for the plaintiff in his closing argument to the jury. See affidavits." This point is not made in the petition in error, but is contained in the motion for a new trial. At the foot of the bill of exceptions I find the following: "In the course of his argument in summing up the case Mr. Thurston made use of this language: 'If the great mind of Andrew J. Poppleton had been defending this case, he would never have allowed it to come to trial.' Mr. Howe—'I object to any such statements; if I could reply it would make no difference; it is not fair to reserve to the close such arguments which cannot be replied to by me.' The Court—'The discussion must be confined to the issues.' Mr. Thurston—'An Omaha lawyer the other day got fifteen thousand dollars in Chicago for being put off a train.' Mr. Howe—'I object and except to the statement made by the counsel.' The Court—'I think they are inadmissible.' Mr. Thurston—'I retract them; I make no statement in this case under objection.'" There are also several affidavits as to what counsel said and did not say. There is also a copy of a journal entry which shows that but one of these affidavits was before the court when the motion for a new trial was considered and overruled. In permitting a record to be made up for presentation in this court different from that before him when he disposed of the motion for a new trial, the learned court seems to have overlooked the true source of the jurisdiction of this court in cases of this kind. I cannot be mistaken in the view that we have no original jurisdiction in this case, but only jurisdiction to pass upon the alleged errors of the district court; and to do this intelligently the point should come before us as nearly as it was before it as possible under the circumstances. Again, I do not think the case presented a proper one for the use of affidavits in any event. The misconduct charged occurred in open court; the attention of the court was immediately called to it and a ruling of the court had thereon. The facts and all of them could and should have been contained in the bill of exceptions, and certified by the presiding judge, and not left to be gathered from conflicting affidavits. But in any event, it is with the rulings of the district court that we have to do, and only care for the facts as the means of testing such rulings. These rulings on the matter now under consideration were not even excepted to by counsel, and for that reason, under well-known rules, cannot be considered here.

As to the point that the plaintiff in error is not liable in damages to plaintiff below for the injury to the decedent because it occurred on an Indian reservation, I do not think that it arises in this case; and if it does I think that the case

RIGHTS OF COUNSEL IN ARGUMENT TO JURY.

INJURY ON INDIAN RESERVATION.

of *Painter v. Ives*, 4 Neb. 122, is decisive of it; certainly it is, so far as this court is concerned. See also *United States v. Yellow Sun*, 1 Dill, C. C. R. 271.

The point is also made that the reply of the plaintiff was insufficient to put in issue the new matter in the answer, etc. The reply is in these words: "Now comes the plaintiff and replying to the answer herein, denies each and every allegation of new matter therein contained." It does not appear that plaintiff in error took any exception to the reply before trial either by motion or otherwise. Nor did it claim upon the trial that the new matter contained in its answer was admitted for the want of a reply. So I do not see in what manner it can now avail itself of any benefit from this point. As an abstract proposition, however, I agree with counsel in his condemnation of this style of pleading.

As to the final point, that there was error on the part of the district court in admitting in evidence the answers of certain witnesses to the questions therein specified, and in overruling the objections of the defendant below thereto, also in sustaining the objections of plaintiff to questions put to the witnesses therein named by defendant in the court below, I have, after careful consideration, failed to find any material or prejudicial error. But to set out said questions and answers at length with my reasons and conclusions on them respectively would swell this opinion beyond the limits to which it must be confined.

No claim that the verdict was excessive was urged at the hearing, nor do I think that any such objection could be sustained.

The judgment of the district court is affirmed.

Judgment affirmed.

The other judges concur.

**Conductor of Gravel Train and Laborers on Track are Fellow Servants.**—The plaintiff, with a large number of other men, was at work for the respondent, "surfacing track;" that is, filling the dirt and gravel between the ties, and dressing up the surface. The gravel used was brought by a train of flat cars in charge of a conductor and the usual train hands. It was the duty of the men engaged in "surfacing" to get upon the cars, when the gravel train came up, and shovel off the gravel. The men engaged in "surfacing" were not otherwise connected with the train.

*Held*, that the conductor of the train of flat cars was a fellow servant of plaintiff, and that, consequently, plaintiff could not recover against the Company for an injury resulting from the negligence of the conductor. \* *Heine v. Chicago and Northwestern R. R. Co.*, 58 Wis. 525, November 20th, 1888, citing and reviewing *Chamberlain v. M. & M. R. R. Co.*, 7 Wis. 425; *Moseley v. Chamberlain*, 18 Wis. 700; *Cooper v. M. & P. R. R. Co.*, 23 Wis. 668; *Brabbitts v. C. & N. W. R. R. Co.*, 38 Wis. 289, 297; *Wedgwood v. C. & N. W. R. R. Co.*, 41 Wis. 478, 44 Wis. 44; *Stetler v. C. & N. W. R. R. Co.*, 46 Wis. 497; *Schultz v. C. M. & St. P. R. R. Co.*, 40 Wis. 589, 48 Wis. 375; *Thompson v. Hermann*, 47 Wis. 602; *Bessix v. C. & N. W. R. R. Co.*, 45 Wis. 477.

## INTERNATIONAL AND GREAT NORTHERN R. R. Co.

v.

HESTER.

*(Advance Case. Texas, 1885.)*

One accepting employment as a section hand assumes all the risks ordinarily incident to the employment, and the company is not liable to him for injuries resulting from such assumed risks. But if the injuries resulted from superadded risk occasioned by the negligence of the company or its immediate representative, he could recover unless he in some way contributed to the injury by a failure to exercise such reasonable care as the occasion required.

In accepting the employment he not only assumes the risks ordinarily incident to the particular service, but also assumes that he has the capacity to understand the nature and extent of the service and the requisite ability to perform it.

Appellee was a section hand on appellant's road; he and others were ordered out on the road to make repairs; the regular train was late and the "section gang" were ordered to give way to it; it was bearing down on them when orders were given to abandon the hand-car; appellee failed to obey the order promptly and was injured. *Held*, the evidence does not support a judgment for appellee.

APPEAL from Travis County.

*Macey & Fisher* for appellant.

*Smith & Trigg* for appellee.

June 18, 1883, appellee brought this suit against appellant to recover damages for injuries received while in its employ as a section hand, and claimed to have been caused by the negligence of Wilson, the section boss, who, it is claimed, had full power to employ and discharge the servants under him.

Appellant answered by general and special exceptions, general denial, and specially, that appellee and Wilson were fellow-servants, and therefore no recovery could be had on account of Wilson's negligence; also that the injuries resulted from appellee's want of ordinary care and diligence.

The cause was tried November 25, 1884, and resulted in a verdict and judgment for appellee for the sum of \$2000, from which this appeal was taken.

WATTS, J.—But one question presented by the assignment of errors will be considered in the disposition of this appeal, and that is presented by the sixth assignment of error, which is as follows: "VI. The verdict of the jury was against and contrary FACTS.

to the law and evidence, and was wholly without evidence to authorize or support it:

1. Because the testimony for the plaintiff, including his own evidence, and that for the defendant alike affirmatively prove that Wilson was not only not negligent upon the occasion of the accident to plaintiff, but that, at the time of and prior to the collision, he was in the exercise of the greatest care, and throughout did all that a careful and prudent man could do to prevent the accident and protect his men from hurt.

2. Because said testimony further proved that the hurts received by plaintiff, if not the result of inevitable accident, resulted directly and proximately from his own want of ordinary care in failing, with ample time before him, to remove himself from the path of a known and apparent danger to a place of safety."

It may be assumed that Wilson was the representative of the company, and for whose negligence it would be responsible; and also that if the injury to appellee was occasioned by Wilson's negligence, then the verdict and judgment must be considered as sustained by the evidence.

When appellee accepted the employment as section hand he assumed all the risks ordinarily incident to such employment, and the company would not be liable to him for injuries resulting from such assumed risks. But if the injuries were occasioned by super-added risk resulting from the negligence of the company or its immediate representative, then a liability would exist for which he would be entitled to recover, unless he in some way or other contributed to the injury by a failure on his part to exercise such reasonable care as the occasion required. *Wall v. T. & P. R. R.*, 4 Texas Law Review, 36; *T. & R. R. v. Burns*, 4 Texas Law Review, 54, and authorities cited.

In accepting the employment appellee not only assumed the risks ordinarily incident to the particular service, but he also assumed that he had the capacity to understand the nature and extent of the service, and the requisite ability to perform it. *Watson v. H. & T. C. R. R.*, 58 Texas, 439; s. c., 11 Am. & Eng. R. R. Cas. 213.

It appears that while the nature of the service and duties of section gangs require that they should move from point to point along that portion of the line which constitutes the section, in hand-cars, to repair the road-bed and note its condition, in doing so they are expected and required to keep a watch for passing trains and to protect themselves from danger from that source. From the evidence it appears that passing trains have the right of the track, and section gangs are required to look out for themselves and to remove from the track their hand-cars so as to allow moving trains to pass without interruption or danger from collision with such hand-cars. As a matter of

EMPLOYEE ASSUMES RISKS OF EMPLOYMENT.

DUTIES OF SECTION GANGS.



course, in the performance of these duties by the section hands, they are exposed to more or less danger when on the track by reason of moving trains, but such risks are assumed by them in entering the service and in accepting the employment; and if injury results from such assumed risks, without the risk being aided or increased by the negligence of the company or its superintending agencies, it will be considered an inevitable accident for which no liability can attach to the company.

There is no pretence that the company or its agents can be charged with negligence for having the section gang to go out to labor upon the line on that foggy day; while the condition of the weather might add to the risks ordinarily incident to the performance of the service in clear weather, still the service contracted to be performed was of such nature and importance as to embrace within its scope dark and cloudy as well as clear weather. Had appellee desired exemption from any danger incident to the changes in the weather, he should have contracted for it in entering the service. *Watson v. H. & T. C. R. R.*, 11 Am. & Eng. R. R. Cas. 213.

It appears from the evidence that Wilson had been directed by his superior to repair a certain portion of the track on his section the day appellee received the injuries, and that the FACTS. accident occurred while the gang were on their way to the designated point. The evidence shows that the morning was foggy and dark, and that the accident happened about 8 o'clock, some three or four miles east of Duval, the place from which they started; that they knew the west-bound passenger train was behind the schedule time, and that they were likely to meet it at any time. They were moving at the rate of about two miles per hour, halting frequently to look and listen for the expected train. At the point where the collision occurred the track was straight and level, and it appears that the engineer had the headlight of the engine burning. According to the evidence of appellee, the train, when discovered by them, was from 50 to 150 yards distant, and that they immediately stopped the hand-car, and Wilson directed them to take it from the track; that they had turned it across the track so as to remove it when he noticed that the engine was so near that he attempted to get out of the way of danger, but the engine struck the hand-car, throwing it upon that side of the track where he was, striking him with the "jigger stick" of the hand-car, by which his thigh was broken and his head and eye were severely injured. It was the admitted duty of the "section gang" to remove the hand-car from the track, if that could be done without unnecessarily exposing themselves to danger. The gist of the complaint seems to be that Wilson's negligence consists in his failure to order the men to get out of the way and protect themselves as soon as the occasion required him to do so. Upon this point appellee testified that

Wilson ordered them to take the car from the track, and that if he afterwards directed them to let the car go and to get out of the way, then he did not hear the order; he was on the east while the others were on the west side of the track, and that he was confused by his situation. He further states that the other hands told him afterwards that Wilson did give order for the men to get out of the way, and they obeyed the order and escaped injury.

The only other witness who testified to anything with reference to the directions or orders given by Wilson was John Davidson, whose depositions were taken by appellant but introduced by appellee. He was one of the "section gang," and present at the time. He testified that when they saw the engine coming they stopped and began running the hand-car off the track under Wilson's orders, but that when they had got it only partly off the track Wilson ordered them to get out of the way and let the hand-car go, and that this order was repeated two or three times by Wilson. He further says that appellee "was short-sighted and partly deaf, and seemed stupid, having to be told two or three times, often, about his work." This witness also states that "we were all trying to get the hand-car off the track, and when we were ordered to get out of the way, we all, except the plaintiff, got off on the west side of the track out of the way. We were equally exposed with the plaintiff, but had time to get out of the way after we were ordered to." In another connection he says that "from the time the engine was first seen by the man on the hand-car and the collision, the danger was apparent, and it was reckless to stand and try to get the hand-car off after the order was given to get out of the way."

There is no culpable negligence on the part of Wilson shown by the evidence; on the contrary, he seems to have discharged his duty faithfully and with due care, considering the situation, while appellee, it appears, had accepted employment in a dangerous service and one in which he had but little experience and for which he was unfit.

His injuries were serious and permanent, and the amount awarded as compensation would not be considered excessive, provided the liability of the company had been shown; but as the case is presented by the record, we are of the opinion that the verdict and judgment are not sustained by the evidence, and, therefore, report for a reversal of the judgment and a remanding of the cause.

Reversed and remanded.

McKINNE

v.

CALIFORNIA SOUTHERN R. R. Co.

*(Advance Case, California. January 10, 1885.)*

In an action for damages for injuries received, a laborer on a railroad, by returning from his place of work on a hand-car at a later hour than usual, is not guilty of contributory negligence, if he was acting under the direction of a foreman as to the hours of labor and as to the movements of the hand-car.

A railroad train-despatcher, having authority to employ and discharge men, is not a fellow-employee with a track laborer within the meaning of the statute.

APPEAL from the superior court of the county of San Diego.

*M. A. Luce* for appellant.

*Z. Montgomery* and *Conklin & Hunsaker* for respondents.

MYRICK, J.—Action for damages for injuries received by plaintiff, a laborer, while in the employ of defendant. The defendant was constructing a railroad from San Diego to Colton. Some 20 miles of the road had been constructed, from National City towards Colton. The plaintiff was a laborer, who, with four others, under one Lynch, foreman of the gang, had been sent out on the twenty-fourth of October to make some repairs FACTS. at a point on the line of the road. On the same day an extra gang of five men were sent out to assist them. Lynch's men went out on a hand-car furnished for the purpose, the extra men being taken out on a construction train and set down at the point of work. Lynch had instructions to bring in the extra men with him, at night, on the hand-car. The usual direction was to be as near 6 o'clock as could be. In order to comply with this direction, the men usually worked at that season of the year until some time between 5 and 6 o'clock, when the hand-car would be put on the track, and the men would come in on it. On the occasion involved in this action, Lynch directed the men to stop work at about 5 o'clock, earlier than usual, having the five extra men to bring in, and put the hand-car on the track for return. The having 11 men instead of 6 (the usual number) would naturally, and did, delay the moving of the hand-car; so much so that at about half-past 6 o'clock, the time the occurrence took place, the men had not reached the station. A special train, consisting of a locomotive and flat car, was sent out about 5.50 P. M. to go up the road and bring in other men. This train was sent out by one Fisher, who was material agent and train-despatcher for defendant, and had charge of the moving of trains. This train was backing

up; the conductor, with a conductor's white light, being on the flat car. The conductor had no orders as to the hand-car, and the men on the hand-car had no information that the train was to be sent out. The only train running regularly was a construction train, which was at the upper end of the track, and was delayed to bring in some men from that point. At about half-past 6, after dark, the hand-car and the special train came together. The plaintiff was engaged in turning the crank of the hand-car, and therefore not in a condition to be on the lookout. Others on the car saw a white light some distance ahead, and, supposing it to be the light of some carpenters at work on a tank near the track, gave no alarm. The men on the hand-car had no light. The conductor of the train had a white light in his hand, and he was at the brake. The train was then running at the rate of 20 miles an hour. He saw no object on the track, until, as he says, when within about 100 feet he saw something, but could not say what it was. He gave signal to reverse the engine, and applied the brake; but too late, for the collision immediately occurred. Just before the collision, the foreman on the hand-car saw the danger and gave the alarm, and all the men except the plaintiff jumped off and escaped comparatively unhurt. The plaintiff was not able to escape in time to save himself, and received serious injuries. The jury gave the plaintiff a verdict for \$10,000 damages, and the defendant appealed.

The defendant thinks the plaintiff should not be allowed to have his judgment, because, first, he was guilty of contributory negligence. It was usual for hand-cars to be in at the station at 6 o'clock. By remaining on the track after that hour the plaintiff contributed to the cause of the injury. In regard to this point it is sufficient to say that plaintiff was under the direction of a foreman as to the hours of labor and as to the movements of the hand-car. The company, by its authorized officer, had incumbered the hand-car by an extra and unusual number of men. Notwithstanding the men, by order of the foreman, quit work and started to return earlier than usual, yet the extra load prevented them from making the station before dark, which, at that season of the year, was about 6 o'clock. Second, Fisher, the material agent and train-despatcher, was a fellow-employee with the plaintiff within the meaning of section 1970, Civil Code, and therefore the defendant is not liable. A rule of the company declared that no extra engine, either with or without train, unless in company with a regular train, would pass over any portion of the road except on an order from the material agent or train-despatcher. The train in question was sent out by the material agent and train-despatcher, and showed no light except the usual conductor's light, which was easily mistaken for a light at

MOVEMENTS OF  
HAND-CAR—CON-  
TRIBUTORY NEG-  
LIGENCE.

TRAIN-DES-  
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BORER NOT FEL-  
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the side of the road. We think that Fisher was not a fellow-employee with the plaintiff within the meaning of the section referred to. *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20. He represented the defendant; was a vice-principal; he employed and discharged men, and directed the movements of trains. When he directed the extra train to go up the road, the company directed it.

We think the jury was justified in concluding that the facts presented a case where a laborer, placed by the company under the direction of a foreman, and while acting in accordance with such direction, in the ordinary pursuit of his labor for the company, was injured by an occurrence caused by the company,—not intentionally, of course, as to the result, yet caused by the company,—and that the company alone was guilty of negligence. This view practically disposes of the questions presented by the appellant. Judgment and order confirmed.

We concur—THORNTON, J.; SHARPSTEIN, J.

**Servant of Railroad Company Killed on Hand-car by Belated Passenger Train, Railroad Company held not Liable.**—A section boss on a railroad and his crew took a hand-car to go from Reed's mill to a switch, about one-half mile east, where they would go from the main track upon a second track on their way to work. A passenger train, which should have passed that point one hour and a half before, was behind time. It overtook and run into the hand-car, killing one of the section-men. The foreman did not know and had no reason to believe that the train had not passed, and did not send to or go to the telegraph office, which was one mile distant, to ascertain about the passenger train. The deceased did not know of the whereabouts of the belated train, although he had the same opportunity of knowing as the foreman. There was no carelessness in the running of the train.

**Held:** That the railroad company could not be required to respond in damages to the representatives of the deceased, as he voluntarily and without protest mounted and rode upon the hand-car. *NASH, J.*—"The evidence shows that the deceased had lived near Reed's mill for several years, and had the same opportunity to know, in regard to the situation on the morning of the accident, as the foreman, Loftus, and the other members of his crew. It does not appear that he rode upon the hand-car by any command or coercion from his superior. The car was provided for the convenience of the men in getting to their work. The men mounted the car without objection, the deceased as willingly as the others. So far as anything appears, all were ready to take the risk from delayed trains without the delay of sending to the telegraph office, one mile away, which would have protected them. There was no negligence in the running of the train after the discovery of the hand-car, and if a look-out had been kept by the men on the hand-car, it does not appear that the accident would have been prevented, on account of the frequent and sharp curves in the road. As the deceased voluntarily and without objection assumed the risks, his representatives cannot recover Judgment reversed." \**Pittsburgh, C. & St. L. R. R. Co. v. Leech, Adm'r*, Ohio Supreme Court Com., Dec. 2, 1884.

DUNLAVY

v.

CHICAGO, ROCK ISLAND AND PACIFIC R. R. Co.

(*Advance Case, Iowa. June 8, 1885.*)

In an action for an injury to a brakeman the question whether the conductor in this case waited a reasonable time for the proper signal before applying the brakes was a question for the jury, and the instruction of the court in that respect was erroneous.

When the party who has the burden of proving care can show by direct evidence what care was exercised, he should show it by such evidence; and if the direct evidence shows care, or a want of it, there is no room for a mere inference; and under such circumstance it is error to instruct the jury that they "may take into consideration, in weighing the evidence, the hazardous nature of the employment of the party injured, and give due weight to the instinct and presumptions which naturally lead men to avoid injury and preserve their own lives."

A railroad company is not liable for a mistake of judgment of a conductor in applying the brakes so as to injure a brakeman if he acted as an ordinarily prudent man would have done under like circumstances.

APPEAL from Keokuk district court.

Action to recover for a personal injury. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

*M. A. Low* for appellant.

*Leggett & McKeney* and *Sampson & Brown* for appellee.

ADAMS, J.—The plaintiff was employed by the defendant as a brakeman on a freight train. On the evening of the thirtieth of March, 1880, he fell from the train and was run over, and suffered the loss of an arm. The evidence tended to show that at the time of the accident he was engaged in uncoupling one part of the train from the other, the train being in motion; and while so engaged

FACTS. the conductor applied a brake and so checked the motion of the train as to cause a violent jerk, and by reason thereof plaintiff fell off. The negligence complained of is said to consist in applying the brake. The train consisted of some flat cars, some stock cars, and a caboose. The plaintiff had been riding in the caboose, and was directed by the conductor to go out and pass over the stock cars and uncouple them while in motion from the cars ahead of them. The train, it appears, was running slack and pushing the engine. The uncoupling was to be effected by the plaintiff by descending the front end of the forward stock car and drawing the pin while standing upon the draw-head. He testified that he had descended the ladder and was holding to the same with his left hand, his left

foot remaining upon the ladder and his right foot resting upon the draw-head; and that while in this position he was reaching down with his right hand to draw the pin, when he was thrown off by reason of the application of the brake. He also testified that, according to the custom, the conductor should not have applied the brake until he (plaintiff) had reappeared upon the other part of the train, and had given a signal to the engineer to increase speed. The defendant claims that it was not the custom for the conductor to await such signal, nor for such signal to be given; but that it was the conductor's duty to apply the brake when a certain place was reached; that the plaintiff knew that the brake was to be applied when the place had been reached, and should have been upon his guard, and should have maintained, as he might have done, such a hold upon the ladder as not to have been jerked off. There was evidence showing that the train was approaching the town of Libertyville, and tending to show that the conductor applied the brake at the usual and proper place, and that in so doing he was influenced by the fact that he had reached the proper place, and by the further fact that he saw a person with a lantern on the forward part of the train whom he supposed was the plaintiff.

1. The court gave an instruction to the jury in these words: "If you find from the testimony that the plaintiff was directed by his conductor to cut the train while in motion, and that it had been and was the custom under such circumstances PROPER TIME TO WAIT FOR SIGNALS. among train-men on freight trains on defendant's road for the conductor in charge of the rear end of the train to not put on the brakes until the brakeman signalled the engineer and the conductor that the brakeman was ready for the brakes; or, though there may not have been a custom, if you find that the undertaking was hazardous, and that on account thereof and all the circumstances ordinary care required the conductor to wait for such signal before applying the brakes; and you further find that the circumstances were ordinary and the conductor, within one and one-half to two minutes after the brakeman started, without waiting for the signal, put on the brakes, and thereby caused the injury by jerking the plaintiff off while pulling the pin, and the plaintiff was without fault on his part,—your verdict should be for the plaintiff." The giving of this instruction is assigned as error.

When a train is approaching a station under the circumstances of this one, it is important that the brakes should be applied to the rear part in time to stop it at the proper place. The evidence in the case shows clearly what difficulties arise if this is not done. The brakeman may be presumed to know about where the brake should be applied, and if he is informed in time that the train is to be cut, he should see to it that this is done before reaching the place where the brake is to be applied. If he cuts the train before the brake is applied, it appears from the evidence that he may

secure himself without much difficulty against the effect of the jerk consequent upon the application of the brake. So far we think there can be no controversy. But after a fault has been committed, difficulties begin to arise. There was evidence tending to show that the plaintiff should have cut the train sooner than he did. Whether it was the plaintiff's fault that he did not succeed in cutting the train and in securing himself depends much upon whether he was informed soon enough that the train was to be cut. But whether he was in fault or not the conductor owed him the duty of reasonable care. He knew, of course, that a violent jerk would expose the plaintiff, if made when he was in the act of pulling the pin and if he was not upon his guard; it is very clear, therefore, that it was the duty of the conductor to wait as long as he could properly, unless he had evidence that the uncoupling had been effected. Indeed, in applying the brake sooner the slack was taken up and the uncoupling prevented.

How long a conductor should wait in a case of uncertainty as to whether the uncoupling has been effected, or what degree of certainty he should have that the uncoupling has been effected before applying the brake, are questions which depend upon several circumstances bearing more or less upon each other. The controlling considerations are those which arise naturally out of the facts, and are the proper subjects of argument by counsel rather than instructions by the court. In the instruction above set out the court instructed the jury, in effect, that if the circumstances were ordinary, the conductor should, after the brakeman started, have waited at least two minutes. In our opinion this matter of time should have been left to the jury. The undisputed evidence shows that the conductor saw a brakeman on the forward part of the train with a lantern, whom he supposed was the plaintiff. The instruction is based upon the theory that the jury might find that the circumstances, including this circumstance, were ordinary. Now, we are not prepared to say that the conductor, seeing what he did, was, as a matter of law, guilty of negligence if he did not wait two minutes. Perhaps he was; perhaps he should have had a greater degree of certainty as to the identity of the person he saw. But a mistake does not necessarily evince negligence. The question is, did he act with such care as a reasonably prudent man might have been expected to use under the circumstances? We cannot say that, as a matter of law, he did not, even if he waited less than two minutes.

2. The court instructed the jury in these words: "The jury may take into consideration in weighing the evidence the hazardous nature of the work in which the brakeman was employed, and give due weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives." The giving of this instruction is

HAZARDOUS NATURE OF WORK, CONSIDERATION OF, BY JURY.



assigned as error. The instinct of self-preservation, planted in all persons, may, in a proper case, be allowed some weight as raising an inference of care. *Way v. Illinois Cent. R. R. Co.*, 40 Iowa, 345. But where the party who has the burden of proving care can show by direct evidence what care was exercised, he should, we think, show it by such evidence; and if the direct evidence shows care, or a want of it, there is no room for a mere inference. The plaintiff was able to show by direct evidence what care he exercised. The case is different from *Way v. Illinois Cent. R. R. Co.*, above cited. We think that the instruction is erroneous.

3. The defendant asked the court to give an instruction as follows: "The defendant is not liable for a mistake of judgment of the conductor in applying the brakes if he acted as an ordinarily prudent man would have done under like circumstances." The court refused to give the instruction, and the defendant assigns the refusal as error. In our opinion, the instruction should have been given. It was a correct expression of the law as applicable to the theory of the defence. It is claimed by the plaintiff that the instruction was covered by other instructions given, but it does not appear to us that it was.

We think that the judgment of the district court must be reversed.

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### TIERNNEY

v.

MINNEAPOLIS AND ST. LOUIS R. R. Co. *et al.*

(*Advance Case, Minnesota. April 6, 1885.*)

Where, in an action against two defendants jointly, evidence was introduced tending to establish a joint liability, it is too late to raise the objection for the first time in this court that evidence was also suffered to go to the jury tending to prove negligence on the part of one defendant only.

It is incumbent upon a railway corporation, in the discharge of its duty as master, not only to provide machinery and instrumentalities for its employees which are suitable and safe, but also to use reasonable diligence to keep them so. Necessarily incident to these obligations is the duty of frequent inspection, and the corporation, acting by its servants in the discharge of such duty, is liable for their negligence.

By a regulation governing the employees in the transfer-yard of a railway company, car-inspectors were required to inspect incoming cars immediately upon their arrival, and if out of repair to mark them "in bad order," indicating that they were to be sent to the "repair track." *Held*, that negligence on the part of the inspectors in failing to properly discharge this duty, by reason of which plaintiff was injured while attempting to couple a damaged car without notice of its condition, and without fault on his part, might be imputed to the company.

It will not be presumed under such circumstances that the plaintiff assumed the risk of such negligent inspection, unless it appear that he undertook to handle cars in the course of his employment without reference to inspection.

A witness who is not an expert may testify to facts within his knowledge and observation in reference to the health and physical condition of an injured person.

The decision of the trial court upon a motion for a new trial for alleged misconduct of jurors, made upon conflicting affidavits, will not be reversed unless clearly erroneous.

The damages assessed by the jury in this case held not so excessive as to warrant the interference of this court for such cause.

APPEAL from an order of the district court, Freeborn County, denying motion for new trial.

*Lovely & Morgan* for respondent, Barney C. Tierney.

*J. D. Springer* and *Whytock & Todd* for appellants, Minneapolis & St. L. R. R. Co. and Burlington, C. R. & N. R. R. Co.

VANDEBURGH, J.—It is admitted that the defendants jointly owned, maintained, and occupied a yard in common at Albert Lea, where trains were made up to be sent over their respective lines. The respondent had charge of the making-up of night trains in the yard, and was injured in the course of his employment

FACTS. while coupling cars, at about 3 o'clock in the morning of November 24, 1882. A freight train had previously arrived from Minneapolis over the Minneapolis & St. Louis road, including, with others, a box-car loaded with flour at that place and bound east. On its arrival, it became plaintiff's duty, according to the usual course of business, to obtain a list of the cars and their destination, so that he might proceed to make the necessary transfers in making up the outgoing trains. It was the duty of the car-inspectors, two of whom were employed for night service, to inspect all cars in trains on their arrival. The plaintiff had been in the employ of defendants a little more than two weeks, and must have been familiar with the manner in which the business was carried on in the yard. On the night in question, about half an hour after the arrival of the train mentioned, the plaintiff, who had been switching and distributing cars, brought an unloaded flat car from the wood track to the main track, upon which the box car we have referred to still stood, and undertook to couple them. His evidence tends to show that as he went to make the coupling, and while the cars were coming together in the usual way, the draw-bar of the flat car struck and overrode the draw-bar of the box car, which appeared to be loose and insecurely supported, and dropped down when struck by the approaching car, thus permitting the two cars to come together and intercept the plaintiff, and resulting in his being run over upon the track, and in causing the loss of a leg, which was necessarily amputated above the knee.

1. While it may be conceded, for the purposes of this case, that

from the circumstances and nature of plaintiff's employment, in which cars from many roads were brought together with coupling attachments of different heights and patterns, SERVANT—ORDINARY RISKS OF EMPLOYMENT. he would assume the ordinary risks of the service from such causes, we think, upon the evidence, the question was fairly for the jury whether the accident occurred from such causes, or from the fact that the draw-bar of the box car was insecurely supported and in an unsafe condition, from neglect to repair the same. Upon this issue the evidence in plaintiff's behalf, among other things, tended to show that the strap or carrying-iron which supported the draw-bar was worn, weak, and loose, and that some of the bolts which were intended to keep this iron strap in place were loose or broken; that it had been out of repair for a considerable time, and the defects were such as could readily be discovered by proper inspection.

2. The evidence of the defective condition of the car, which appears to have been previously in the possession of one of the defendants, the Minneapolis & St. Louis Company, at Minneapolis and during its transit to Albert Lea, a distance of 108 miles, was received and submitted to the jury without any objection or suggestion that the liability did not attach equally to both defendants for any negligence in respect to this car prior to its arrival at Albert Lea. This point is now suggested for the first time; but we think, under the circumstances, the attention of the court should have been called to this matter when the evidence was received, or when the jury were instructed. As the case stands, since we think there was evidence for the jury tending to show a joint liability for negligence in the yard at Albert Lea, it is too late to raise the question in this court as to the competency or sufficiency of the evidence of previous negligence to charge the defendants.

3. Evidence was received, under the defendants' exception, showing a regulation of defendants in relation to the inspection of cars, under which it became the duty of the car-inspectors, if any were found defective or in need of repairs, to mark them so as to indicate that they were in bad order, and hence not to be sent out, but to be sent to the repair track. We think this evidence EVIDENCE—REGULATION AS TO INSPECTION OF CARS. was properly received upon the question of defendants' liability; for if the car in question was defective and unsafe, which, as we have seen, was for the jury, then such regulation was binding upon the inspectors, as representing the defendants, for the protection of employees in the yard, unless it should appear that it was risks of the service assumed by them to handle cars there without regard to inspection or their condition, or any notice thereof. It is for the jury, under proper instructions, to determine whether or not, from the nature of the service in which the plaintiff was employed, he was required to proceed to switch cars and make up trains without regard to inspection, and without waiting for it; but instructions of this character were not asked or given, and the evi-

dence does not show that such risk necessarily attached to plaintiff's business, and was hence assumed by him.

The position taken by defendants' counsel at the trial appears to have been that the plaintiff did not give the inspectors the necessary time to complete their work; and the case was submitted to the jury under instructions given, at defendants' request, that "if he did not do so," or "if he did not know or have reason to believe that all the cars in said train were inspected before he caused them to be moved, he cannot recover." This question was determined by the jury in plaintiff's favor upon the evidence.

As before remarked, it was the duty of the inspectors to examine cars immediately upon their arrival, and the evidence tends to prove that it was their practice to so inspect them upon the track before their removal. The inspection of the train was, in fact, so made on the night in question. There is some conflict in the testimony as to the length of time it would take to properly inspect such a train of cars, and it does not clearly appear how much time had elapsed before the injury; the plaintiff's recollection being that it was from 25 to 40 minutes. But it appears that the inspectors had, in fact, completed their work before the accident. The negligence of the inspectors was therefore proper to be considered upon the question of the defendants' liability. If it is the duty of the corporation to exercise reasonable diligence to supply suitable and safe instrumentalities for the use of its servants to work with, it is also its duty to use like diligence to keep the same in proper repair. This necessarily involves inspection and examination as incident to the obligation to repair, and, as a corporation must necessarily act through agents, the negligence of its employees in the discharge of such duty is attributable to the corporation. *Solomon R. R. Co. v. Jones*, 30 Kan. 601; s. c., 15 Am. & Eng. R. R. Cas. 201; *Railroad Co. v. Holt*, 29 Kan. 149; *Brann v. Railroad Co.*, 53 Iowa, 595; *Porter v. Railroad Co.*, 71 Mo. 77, 78; *Railroad Co. v. Jackson*, 55 Ill. 492; *Condon v. Missouri Pacific R. R. Co.*, 78 Mo. 567; *Crispin v. Babbitt*, 81 N. Y. 521; *Fuller v. Jewett*, 80 N. Y. 52, 53; s. c., 1 Am. & Eng. R. R. Cas. 309; *Kirkpatrick v. Railroad Co.*, 79 N. Y. 240; *Slater v. Jewett*, 85 N. Y. 70, 71; s. c., 5 Am. & Eng. R. R. Cas. 515; *Durkin v. Sharp*, 88 N. Y. 227; s. c., 5 Am. & Eng. R. R. Cas. 520; *Murphy v. Railroad Co.*, Id. 152; s. c., 5 Am. & Eng. R. R. Cas. 490; *Dana v. Railroad Co.*, 92 N. Y. 642; *Vosburgh v. Railroad Co.*, 94 N. Y. 380; s. c., 15 Am. & Eng. R. R. Cas. 249; *Kain v. Smith*, 25 Hun, 149; *Wedgwood v. Railroad Co.*, 41 Wis. 483; s. c., 44 Wis. 48, 49; *Smith v. Railroad Co.*, 42 Wis. 526; *Richardson v. Great Eastern R. R. Co.*, L. R. 1 C. P. Div. 342.

In *Fuller v. Jewett*, *supra*, it is said by the court: "The duty of maintaining machinery in repair for the safety of employees is the same in kind as the duty of furnishing a safe and proper ma-

DUTY OF CORPORATION TO KEEP MACHINERY IN REPAIR.

chine in the first instance ;” and “in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury.” This corresponds to the language of the same court (Church, C. J.) in *Flike v. Railroad Co.*, 53 N. Y. 553, and (Folger, C. J.) in *Slater v. Jewett*, 85 N. Y. 70, 71 ; s. c., 5 Am. & Eng. R. R. Cas. 515. Substantially the same doctrine is adopted by this court in *Drymala v. Thompson*, 26 Minn. 41, and we think that case must control the disposition of the question under consideration. In some States the courts hold that this rule is not applicable to subordinate employees, as in the case of ordinary car-inspectors at the transfer yards, but that the latter are to be deemed fellow-servants of other employees injured through their negligence. *Railroad Cos. v. Webb*, 12 Ohio St. 494 ; *Little Miami R. R. v. Fitzpatrick*, 17 Am. & Eng. R. R. Cas. 578 ; *Smart v. Railroad Co.*, 77 Ala. —. The rule adopted in these and other cases is followed in *Smith v. Railroad Co.*, 46 ; Mich. 258 ; *Mackin v. Railroad Co.*, 135 Mass. 206 ; s. c., 15 Am. & Eng. R. R. Cas. 196, as applied to foreign cars in transit, which a railway company is obliged by law to draw over its line. In the case last cited the court says, by way of explanation : “However it may be as to other cars, the inspectors must be regarded as engaged in a common employment as to such cars while in transit, and until ready to be inspected for a new service.” One reason given is that the company was not obliged to repair such cars. That question we need not consider in this case. This car was loaded at the terminus of the line, and by defendants’ own regulations was required to be inspected, and, if damaged, to be properly marked to indicate that fact, at its general yard at Albert Lea, by the agents of the defendants appointed for such purpose.

It is difficult to lay down a general rule which will be applicable in practice and define accurately the limits of the master’s liability in this class of cases. But if the special duty and responsibility belong to the car-inspector to examine and determine whether a car is unfit for service, and shall be so marked and sent to the repair track or shop, it is difficult to discover any distinction in kind between his duty and that of the mechanics who make the repairs. It will also be borne in mind that the measure of liability on the part of the company is reasonable care, which must be determined by the circumstances in each case. Experience in the competent and practical management of railroads will naturally determine the nature and frequency of inspections which ordinary care would require should be made between the intervals of the more minute examinations at the general repair-shops. But the general examinations which experience has shown practicable and necessary to be made of cars at the yards designated for such purpose, without causing undue

DUTY OF COMPANY AS TO INSPECTION OF CARS.

delay while in course of transportation, would at least include such patent defects as would be readily discoverable upon inspection by a competent person in the exercise of reasonable care. *Richardson v. Great Eastern R. R. Co., supra.*

In respect to patent defects in the coupling apparatus, brakes, wheels, etc., we may assume that the defendants had undertaken the duty of inspection, and intrusted it to the proper agents. As a rule, also, there is a distinction between the special duties of such persons and the service of other employees who are engaged in handling cars and operating trains. It is not the same in kind as that of the switchman, brakeman, or other operative. *Wedgwood v. Railroad Co., 44 Wis. 483; Schultz v. Railroad Co., 48 Wis. 381; s. c., 2 Am. & Eng. R. R. Cas. 671.* The service of the former class relates wholly to the matter of the care and repair of machinery, the use of which is attended with constant danger to other employees unless maintained in a safe condition; and they represent the master, not in the capacity of superior officers placed over other employees, but because performing the master's duty in respect to safe instrumentalities. Placing and keeping such machinery upon the road in actual use would be an assurance to ordinary servants that the same is fit and safe, in so far as the exercise of reasonable diligence could make it. *Murphy v. Railroad Co., 88 N. Y. 152; s. c., 8 Am. & Eng. R. R. Cas. 490.* So, in the matter of separating damaged cars from those remaining in use with a view to repairs, the cases proceed upon the principle that enough must have been done by the master to indicate, in conformity with some proper regulations or usage of the company, the condition or character of such cars for the protection of employees who are to handle them. *Flannagan v. Railroad Co., 50 Wis. 471; s. c., 2 Am. & Eng. R. R. Cas. 150; Watson v. Railroad Co., 58 Tex. 439; Fraker v. Railroad Co., 15 Am. & Eng. R. R. Cas. 256.* And the rule that the corporation is bound to know the defective condition of its cars within a reasonable time is in harmony with the doctrine that the agents charged with a special duty of looking after and repairing its cars and machinery *pro hac vice* represent the master.

As before stated, this case does not, we think, differ in principle from *Drymala v. Thompson, supra.* There the negligence of the section foreman engaged in repairing the track, who would have otherwise been deemed a fellow-servant with the injured party, was held to be that of the defendants, and it would have constituted no defence that the company had employed competent men, adopted proper regulations, or provided suitable materials, and an adequate system for supervising and repairing its track. On the other hand, in *Brown v. Railroad Co., 27 Minn. 162,* a road-master engaged with the injured party in operating machinery was held not to represent the company. It is the kind of service, not the

SERVANT TO THE  
SPECT STANDS IN  
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grade, which distinguishes these two cases. The one related to maintaining safe instrumentalities; the other, to the use of them.

The application of the rule, as well as the question of the degree of risk assumed by employees, will, of course, be largely influenced by the special circumstances of any particular case. And so, as to different kinds of business, the amount of care required, and the system to be adopted and carried out, are to be determined by the circumstances of each case, depending upon the nature of employment, the extent, hazard, and usages of the business, the kind of machinery used, and the risks incident thereto. *Kain v. Smith*, 25 Hun. 149.

4. A witness acquainted with plaintiff's physical condition, though not a physician, was permitted to testify, against the objection of the defendants, to the state of plaintiff's health before and after the accident, and, among other things, that he had since had a skin disease. As he merely stated facts within his observation, and expressed no opinion, the evidence was competent.

5. The application for a new trial on the ground of misconduct of the jury was made upon affidavits, which are met by counter-affidavits, and was thus determined upon conflicting evidence. It also appears that some of the affidavits on plaintiff's part are not returned to this court. We see no reason, therefore, for questioning the correctness of the decision of the trial court on this point. *Peterson v. Faust*, 30 Minn. 23. So, also, as respects the damages, which are claimed to be excessive; the question was within the province of the jury to determine; and considering the nature of the injury, the age of the plaintiff, extent of his disability and suffering, we are unable to say that the trial court erred in refusing to set aside the verdict for such cause.

Order affirmed.

MITCHELL, J., dissenting.—As I understand the facts of the case, the duty of these "car-inspectors" was simply to make a general cursory examination of cars *en route*, upon the arrival at the yard, so as to detect any patent defects. Their duty was substantially the same as that of local examiners, employed at certain intervals along the line of every railroad, who make a like cursory examination of the cars of a train in transit. They are ordinary servants of the company, intrusted with no general control or discretion in the management of the company's business or any department, but simply charged with the performance of certain special executive duties in the matter of such local inspection. I think they were mere fellow-servants with those employed in running the trains or moving the cars.

There is much difference of opinion as to whether the doctrine of "common employment" works equitably, as applied to the large business enterprises of the present day, with their numerous de-

partments and different grades of service. But the doctrine has become too thoroughly imbedded in the jurisprudence of England and this country to be disturbed by the courts. If it is to be changed, it must be by the legislature. It seems to me that the doctrine laid down in the opinion of the court in this case, if carried to its logical consequences, goes a long way towards breaking down this well-established rule, which exempts the master from responsibility for injuries to his servants caused by the negligence of their fellow-servants. This doctrine has been so much and so often considered in the books that it would be useless to enter upon any general discussion of it at this time. But it seems to me that confusion has sometimes arisen from a misapprehension or misapplication of certain maxims or rules bearing upon this subject.

It is often remarked that as corporations can only act through natural persons, who are all in a sense servants of the corporation, to hold general agents or superintendents, to whom is intrusted the management and control of its business, to be fellow-servants with all subordinate employees would be to relieve the corporation of all liability for negligence. It seems sometimes to be inferred from this that a different rule as to such liability is to be applied to corporations from that applied to natural persons. I do not so understand it. In every business there must be some natural person to whom its management and control is intrusted, and who is therefore, if not the master in person, the representative of the master, and for whose acts the master is responsible. If a natural person intrusts the control and management of his business to an agent, such agent is the *alter ego* of the master, precisely as if the same thing be done by a corporation. The only difference is that in the case of a corporation there must be such a representative, whereas in the case of a natural person there may not be, for he may manage his own business in person. But it seems to me that in either case, when the relation of the employee to the business and the master is the same, the same rule must be applied in determining whether he is the representative of the master or merely a fellow-servant as to other employees.

Again, a familiar rule is that the master is bound to use ordinary care in furnishing suitable and safe instrumentalities for the use of his servants. Included in this is that of maintaining them in a safe condition. Repairing is, in a sense, furnishing. And, as necessarily incident to the duty of "maintaining," is the duty of providing an adequate system of inspecting, examining, and guarding these instrumentalities. It is also the rule that this duty of furnishing and maintaining safe instrumentalities is a primary duty of which the master cannot relieve himself by clothing some general agent with the power, and charging him with the duty of making performance for him. but that the failure of such agent will be the failure of the master.

WHO IS VICE-  
PRINCIPAL.

DUTY OF MASTER  
TO KEEP MACHIN-  
ERY IN REPAIR.



This rule has been sometimes understood as meaning that the master is responsible to his servants for the negligence of every employee, however subordinate his station, who is engaged in performing the most common executive duties in the matters of repairing, examining, or watching the instrumentalities intended for the use of other servants. I think this is a misapprehension of the rule, which has sometimes arisen from losing sight of the distinction between one who is clothed with the powers of the master in the control and supervision of some department of the business, and who is *pro hac vice* the representative or *alter ego* of the master, and one who simply performs what may be termed mere executive details.

Of course, in the multitude of cases on this subject with which the reports abound, often conflicting, and frequently not well considered, some authority can be found for almost any proposition. But I have not found any case well considered, either upon principle or upon an examination of the authorities, which seems to me to carry the rule to any such length. I find no support for it in the English cases. The supreme court of Massachusetts, which is one of the few whose decisions on this question are anything like consistent, or seem to be governed by some uniform principle, has always held the master strictly to the performance of this primary duty of exercising ordinary care in furnishing and maintaining safe instrumentalities for the use of his servants, and refused to permit him to shield himself behind the fact that he had clothed some general agent with the power, and charged him with the duty of performing it. This is illustrated by the case of *Ford v. Railroad Co.*, 110 Mass. 240, in which they held the company responsible for the negligence of the master mechanic in not repairing an engine, he having entire charge of that department of the business.

But the distinction which I have alluded to is distinctly brought out in the subsequent case of *Holden v. Railroad Co.*, 129 Mass. 268, in which the reasons and limits of the rule and the authorities on the subject are ably discussed by Gray, C. J., and in which it is, in effect, held that a track-repairer and a brakeman are fellow-servants. Almost as a corollary from this last decision followed that of *Mackin v. Railroad Co.*, 135 Mass. 206; s. c., 15 Am. & Eng. R. R. Cas. 196, which holds that a car-inspector and a brakeman employed on the same car are fellow-servants,—a case entirely analogous to the present one.

I have not overlooked the fact that that was a foreign car in transit over the company's road. I also notice the *caveat* in regard to that which the court put into their opinion. But, whatever state of facts they might have had in mind in doing so, it could not have been anything affecting the principle involved in the present case; for it seems to me that this duty of casual inspection

of cars while in transit must be the same, whether the car is a foreign one or a domestic one.

In New York the decisions are so often conflicting that the value of any particular one largely depends upon the composition of the court at the time, or the ability of the judge who wrote the opinion. The primary character of the duty of the master to furnish safe instrumentalities is clearly and ably defined by Folger, J., in *Laning v. Railroad Co.*, 49 N. Y. 532. But the limits to the rule, and the common misapprehension as to its application referred to, are very clearly brought out by Allen, J., in *Malone v. Hathaway*, 64 N. Y. 5. The distinction between a general agent intrusted with the control of some branch or department of the business, and who therefore represents the master, and a servant employed to perform some special duties or executive details in the same department is also pointedly made by Folger, J., in *Slater v. Jewett*, 85 N. Y. 61; 5 Am. & Eng. R. R. Cas. 515. Neither of these cases has ever been questioned or criticised, although two or three late cases in the same court, which seem not very carefully considered, appear to lay down a somewhat different rule, but without much discussion or reference to the authorities. This court has itself recognized the same distinction. In *Brown v. Minneapolis & St. L. R. R. Co.*, 81 Minn. 553; s. c., 15 Am. & Eng. R. R. Cas. 333, we held that a station agent who had general charge of the tracks in and about his station, and whose duty it was to keep them clear and in safe condition for passing trains, was a fellow-servant with an engineer on such a train. In *Roberts v. Railroad Co.*, *supra*, decided at the present term, we held that a switch-tender and a baggage-master were fellow-servants. The *Drymala Case*, 26 Minn. 40, is not in conflict with this distinction. That case was decided upon the ground that the "section foreman," to whom was intrusted the duty of repairing or "furnishing" the track, was the representative of the master; and this was at the time, and is yet, generally considered what might be termed a "border case."

The management of an extensive business, like that of operating a railroad, includes so many departments and so many grades of service that it may not always be an easy matter to draw the line between those who are to be deemed "vice-principles," or representatives of the master, and those who are to be deemed "fellow-servants," as to other employees; but the fact of such a distinction is everywhere recognized. To hold that the master is responsible to his servants for the negligence of every employee of the most subordinate rank who is engaged in the department of repairing, examining, watching, or guarding the instrumentalities used by other employees, would virtually abrogate the whole doctrine of "common employment." There is hardly an employee in the service of any railroad whose duties do not, in part at least, relate to the matter of maintaining in safe condition

CAR INSPECTOR  
IS NOT VICE-  
PRINCIPAL.

the track or rolling stock. If the rule be that all these *pro hao vice* represent the master, and are performing his duty, the same rule must be applied to all masters alike. Such a rule, if applied to farmers, manufacturers, and others, would, I think, effect a radical change in what has been supposed to be the law. And yet this is, I think, the logical result to which the opinion in this case would seem to lead; for I can see no distinction in principle between these "car-inspectors" and switch-tenders, station agents, guards, watchmen, and the like, in so far as their duties relate to maintaining in safe condition the machinery and other instrumentalities of the master, designed to be used by his employees.

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ATCHISON, TOPEKA AND SANTA FÉ R. R. Co.

v.

LEDBETTER.

(Advance Case, Kansas. November 7, 1885.)

In an action by a yard switchman against a railroad company in whose employ he had been for injuries alleged to have resulted in consequence of a defect in the draw-bar of a car, or in some of its accompanying appliances, *held*, that no recovery can be had against the railroad company except by proof of negligence on its part, and that it devolves upon the plaintiff to prove the negligence, and to prove all the facts which constitute or make apparent such negligence; and, therefore, where it was not shown that the railroad company had any knowledge of the defect existing in the draw-bar or in some of its accompanying appliances prior to or at the time of the injury, or that such defect had existed for any considerable length of time, nor what was the nature or character of the defect,—that it was obvious or manifest, or could have been discovered by the exercise of reasonable care and diligence, or by any of the tests employed by car-inspectors; nor that the car had not been properly inspected by the car-inspectors at the yard where the injury is alleged to have occurred,—*held*, that no negligence is shown on the part of the railroad company, and that no cause of action against the railroad company has been proved.

ERROR from Wyandotte County.

This was an action brought in the district court of Wyandotte County on May 31, 1883, by Isaac J. Ledbetter, against the Atchison, Topeka & Santa Fé R. R. Co., to recover damages for personal injuries alleged to have been received by the plaintiff while in the employment of the defendant at Emporia, Kansas, on November 12, 1881. The plaintiff's cause of action is stated in his petition as follows:

"That the plaintiff was, on the twelfth day of November, 1881, and had been for a long time prior thereto, in the employment of said defendant as a switchman or yardman; that on the day afore-

said the said plaintiff, while in the due and ordinary discharge of his duty as such switchman or yardman, and while attempting to couple a moving engine onto a stock-car then standing upon the track of defendant in the yard of said defendant at Emporia Junction, in the county of Lyon, in the State of Kansas, was severely and permanently injured; that the said injury was wholly caused by the defective and bad condition of said stock-car; that the defendant negligently failed to inspect and ascertain its defective and bad condition prior to that time, and that it had a reasonable opportunity so to do; that the defendant knew that the said stock-car was in a defective and bad condition prior to that time, and that it had reasonable opportunity for so knowing; that at the time of the said injury the plaintiff was in the exercise of ordinary care; that the defendant negligently failed to give warning or information to the plaintiff that the said stock-car was in a defective and bad condition, and that the plaintiff had no knowledge of its defective and bad condition, or opportunity to ascertain the same."

The plaintiff claimed judgment for \$10,000. The answer of the defendant was a general denial. On July 24 to July 29, 1884, a trial was had before the court and a jury, which trial resulted in a verdict and judgment in favor of the plaintiff and against the defendant for \$5,000 and costs. The jury also made special findings of fact. The defendant moved for a new trial upon various grounds, which motion was overruled by the court, and on December 4, 1884, the defendant, as plaintiff in error, brought the case to this court for review.

*James Hagerman, A. A. Hurd, and Robert Dunlap* for plaintiff in error.

*Waters & Ensminger* for defendant in error.

VALENTINE, J.—The principal facts brought into this case by the parties, and upon which the plaintiff's cause of action is to be sustained or defeated, are substantially as follows: During the month of November, 1881, and prior thereto, the plaintiff, Isaac J. Ledbetter, was in the employment of the defendant, the Atchison, Topeka & Santa Fé R. R. Co., as a yard switchman at Emporia, Kansas. At that point the defendant had two yards: one at the junction of the Missouri, Kansas & Texas R. R. with the Atchison, Topeka & Santa Fé R. R., and called the "upper yard," and the other about one mile west from there, and called the "lower yard." There were three car-inspectors at these yards, two of whom were to perform their duties in the daytime, and the other to perform his duties in the nighttime, and their principal duties were to inspect cars as they were brought into the yards from other places, and if a car was found to be in such condition as to be unfit for use to mark it "bad order," and have it placed on the repair track for repairs, or sent to the general repair shops at

Topeka for such purpose. It was also the duty of the yard switchmen to inform the car-inspectors of any defects or imperfections which they might discover in any of the cars while performing their work. There was also a physician and surgeon residing at Emporia, near these yards, who was employed by the defendant railroad company to attend professionally to any of the defendant's employees who might become disabled or injured while in the defendant's service, free to the employees and at the defendant's expense. The defendant also had car-repairers and many other employees at those two yards. In the afternoon of November 11, 1881, the plaintiff coupled the switch-engine to the west end of a Vandalia stock-car which was then standing on a track in the lower yard and contained sheep, and the engine and car were then taken to the stock-chute in the upper yard, and there the brakes of the car were set and the car left to be unloaded. On the next morning, November 12, 1881, the plaintiff coupled the same engine to the same end of the same car; the car at the time standing at the same place and in the same condition at which and in which it was left the day before. The car was then removed and placed on a side-track. The engine was then taken around to the other end of the car and was backed towards the car, the tender being between the engine and the car, and the plaintiff stood on the foot-board of the tender, and when the tender came near the car he proceeded to couple them together. When the draw-bar or draught-iron, as it is sometimes called, of the tender struck the draw-bar or draught-iron of the car, the draw-bar of the car was pushed under the dead-wood of such car, without shock, collision, or stroke, and the plaintiff was caught sidewise about the hips, between the dead-wood of the car and the iron band beneath the draw-bar of the tender, and was pressed or squeezed in such a manner as to cause the injuries complained of. He probably received some slight injuries, but no bones were broken or fractured. The car was not marked out of order or in bad order, or in any other manner, and there is no evidence that it was out of order except the foregoing facts; and what was out of order, defective, or imperfect, if there were any defects or imperfection, no one knows, except from the foregoing facts. The plaintiff said nothing at the time about being squeezed or hurt, or the car being out of order, and the engineer, fireman, and foreman of the yard-gang, who were present at the time, had no knowledge of the same. The plaintiff then got off the foot-board of the tender and sat down upon the side-track near by for a few minutes, and then got on the foot-board of the tender again and rode from that place down towards the lower yard to Commercial Street, in the city of Emporia, where he left the engine, tender, and car with the engineer, fireman, and foreman, who accompanied him from the upper yard, and walked to his home in Emporia, a distance of

three or four blocks. What was afterwards done with the car is not shown. When the plaintiff arrived at his home he lay down until dinner. He examined his person and found some bruises upon his hips. He got up and ate his dinner, and then lay down again until 3 o'clock in the afternoon, when he went back to the yards and worked till night. He worked the rest of the month of November for the defendant, and all the month of December, except the period between Christmas and New-year's, when he was given a vacation, and all the month of January, and quit work for the defendant in February and went back to his old home in the State of Illinois. Afterwards he returned to Kansas, and, after working for two or three different railroad companies, commenced again on September 17, 1882, to work for the defendant at Emporia, and afterwards worked for the defendant at Argentine, commencing about December 20, 1882. He worked for the defendant at this place until about April 17, 1883, when he quit work on account of sickness. His sickness was of a malarial character, and he was treated by his physician for malaria, and was benefited. Malarial complaints are common at Argentine, and the plaintiff had suffered from such complaints prior to his coming to Kansas. In May he went to work again for the defendant, but soon quit, and on May 31, 1883, commenced this action.

The plaintiff testified that during all the time from the time when he received the injury at Emporia, on November 12, 1881, down to the time of the trial, he had suffered from the effect of such injury, and that he was often sick and unable to work. But at no time did he consult a physician with regard to such injury, and he was at no time treated by any physician for such injury; but the treatment that he received from the various physicians who at various times prescribed for him was all for malaria, bronchitis, and loss of voice. He did not at any time consult the defendant's physician and surgeon at Emporia. He did not mention the injury to the engineer or fireman who had charge of the switch-engine which was used at the time of the injury, nor to his foreman, nor to any other one of the company's employees at Emporia. In his testimony he almost stated that he mentioned the matter to his foreman, but the jury found against him on this subject. He did not inform the car-repairers at Emporia, or make any report that anything was wrong or out of order with regard to the Vandalia stock-car from which he states he received the injury, although it was his duty to do so, if in fact the car was out of order. He did not, in fact, at that time, nor for many months afterwards, inform any employee, agent, or officer of the defendant that there was anything wrong concerning such stock-car, or that he had received any injury therefrom. He made no claim upon the defendant or any of its officers or agents for damages for the alleged injury until some time in August, 1882, about nine months

after the injury is alleged to have occurred. And neither the engineer of the switch-engine which was used in making the coupling at the time when the plaintiff is alleged to have been injured, nor any other available witness, ever heard of the injury until many months after the injury is alleged to have occurred. The plaintiff testified that something was wrong or broken about the draw-bar of the car, but he did not know what it was, did not examine to see what it was, and made no effort to ascertain what it was. Indeed, he did not carefully examine the car for any purpose. On the day that the injury is alleged to have occurred he only saw the two ends and one side of the car to know whether it was even marked "out of order" or "in bad order" or not. The jury rendered a verdict in favor of the plaintiff and against the defendant for \$5000. The defendant then moved for a new trial upon various grounds, among which was the ground "that the said verdict is not sustained by sufficient evidence and is contrary to law." The court overruled the motion for a new trial, and rendered judgment upon the verdict in favor of the plaintiff and against the defendant for \$5000 and costs, and the defendant, as plaintiff in error, now seeks to have this judgment reversed.

In the examination of the questions involved in this case we shall assume that the draw-bar of the Vandalia stock car, or something connected therewith, was out of order; but in what the defects or imperfections consisted, or what were their nature or character, no one can tell, nor even imagine, unless he wanders into the uncertain regions of conjecture and speculation. This indefiniteness and uncertainty, however, can probably make but little difference, if the defects or imperfections themselves can be traced with reasonable directness and certainty to the negligence of the railroad company. We shall also assume that the plaintiff received injury by reason of the imperfect action of the draw-bar and its accompanying appliances. But this assumption is also open to criticism, and to doubts and uncertainties. But assuming that the draw-bar for some reason failed to operate as it should, and that the plaintiff was injured in consequence thereof, do these things make out a cause of action in favor of the plaintiff and against the defendant? We think not. A railroad company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities used in the operation of its railroad, but is required only to exercise reasonable and ordinary care and diligence to see that all these things are in a reasonably safe condition. In other words, the railroad company is liable to its employees in such cases for negligence only, and this negligence must be shown by the party who asserts the same. The plaintiff claims that the railroad company was guilty of negligence in not having the said Vandalia stock car inspected prior to the time of his attempt to couple the same to the tender; but there is

COMPANY NOT AN  
INSURER OF ITS  
MACHINERY.

not a particle of evidence tending to show that the car was not inspected prior to that time. It may have been inspected at the lower yard, and it may also have been inspected at the upper yard. The fact that the draw-bar or some of its accompanying appliances were out of order does not prove that the car was not inspected. There was no showing that the defect, whatever it may have been, was obvious or manifest. It may have been latent, hidden, and concealed, undiscovered by the exercise of ordinary care and diligence, undiscoverable even by any possible inspection which the yard inspectors could have resorted to. The draw-bar was in its place. The spring may also have been in its place. So may also all the accompanying appliances. All may have appeared to be in perfect condition, and yet may not have been in such condition. If the draw-bar had been obviously out of place, of course the railroad company should have known it. But so also should the plaintiff have known it, and he would have been negligent if he had not known it, and had attempted to make the coupling in the manner in which he did. All persons are bound to use their senses. But the draw-bar was not out of place. It was just where it should have been. It is possible, however, that the spring which keeps the draw-bar in its place may have become partially broken or otherwise out of order, and yet the defect may not have been so obvious as to be discoverable by any possible test which the yard inspectors could have made. The spring may have been strong enough to withstand all their tests, and yet so weak as to be wholly broken or displaced when subjected to the great pressure of the ponderous locomotive engine. The tests made by the car inspectors at stations cannot, of course, be so thorough and exhaustive as the tests made at the general construction shops or repair shops. A test made by the car-inspectors is at best only cursory, and is generally made in less than five minutes' time. There is no evidence as to when the defect in the present case originated. It may have been of long standing, but probably was of very recent origin. No examination was made of the draw-bar or the spring or anything else to see when it apparently originated. It may have originated that morning by reason of the great pressure of the engine. We shall assume, however, that it originated before that time, but that it was not apparent upon an ordinary inspection by car-inspectors. In Wisconsin it has been held as follows:

"One railroad company receiving a loaded car from another, and running it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact." *Ballou v. Chicago, M. & St. P. R. R. Co.*, 54 Wis. 257; s. c., 5 Am. & Eng. R. R. Cas. 480.

All the authorities hold that a railroad company in a case like the present is liable only for negligence, and that it devolves upon



the plaintiff to show the negligence; or, in other words, that it devolves upon the plaintiff to prove all the facts which constitute or make apparent the alleged negligence. In the present case the plaintiff has failed to make any such showing. He has not shown, nor was it shown, that the railroad company had any knowledge of the defect existing in the draw-bar, or in some of its accompanying appliances, prior to or at the time of the injury, or that such defect had existed for any considerable length of time; nor what was the nature or character of the defect; that it was obvious, or manifest, or could have been discovered by the exercise of reasonable care and diligence, or by any of the ordinary tests employed by car-inspectors; nor that the car had been properly inspected by the car-inspectors at one or both of the yards at Emporia; and, not showing any of these things, we think the plaintiff has failed to show negligence on the part of the railroad company; failed to show a cause of action against the railroad company; and therefore is not entitled to recover upon his present presentation of this case. In support of the propositions enunciated in this case, we would refer to the following cases: *Atchison, T. & S. F. R. R. Co. v. Wagner*, 33 Kan. 660; s. c., 7 Pac. Rep. 204, and the numerous authorities there cited. See, also, *Case v. Chicago, R. I. & Pac. R. R. Co.*, 19 Am. & Eng. R. R. Cas. 142; *Disher v. New York Cent. & H. R. R. R. Co.*, 15 Am. & Eng. R. R. Cas. 233.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the justices concurring.

**Inspection of Cars received from Another Company for Through-Transportation.**—A railroad company is not under a duty to its employees of inspecting and testing a loaded car of another company before it receives it on to its line for transportation, with the same degree of care and thoroughness with which it should inspect and test a car bought or manufactured by it before using such car. *Ballou v. Chicago, etc., R. R. Co.*, 54 Wis. 257, 263. In that case the plaintiff's deceased, a brakeman in the employ of the defendant railway company, while climbing a ladder on the side of a freight car in the performance of his duties as brakeman, was thrown under the wheels and killed by reason of the giving-way of one of the rounds of the ladder. The car in question was one which the defendant company had received from another company for through-transportation over its line. The round of the ladder gave way because the bolts fastening it to the side of the car were too small, and also because the stanchion, into which the bolts were screwed, was somewhat decayed. These defects were, however, not noticeable on ordinary inspection and without applying special tests. There was no evidence that the car had been inspected at all by defendants' servants. The majority of the court held that the company was not guilty of negligence in not applying special tests which would have disclosed the defects in the round. Judge Cassoday, who delivered the opinion of the court, said: "There is much propriety in the law exacting rigid tests to the different parts in the first instance, and while a car is in the process of manufacture, which would be impracticable, if not impossible, to repeat

every time a loaded car passed from one railroad company to another. Is one railroad company receiving a loaded car from another railroad company bound to assume that such car was not properly made; that the materials used in its construction were unsuitable or defective; that the workmanship was unskilful? Or may the company so receiving properly assume that such loaded car was skilfully made of suitable materials, and that all the requisite tests in the manufacture of such car had been applied? Is the company so receiving bound to exercise not only such care as is required of those handling and drawing such a car, but also such care as is required of the manufacturer in the selection of materials, the application of tests, and the exercise of skill in the building? May not the company so receiving such loaded car, and without being chargeable with negligence, assume that all parts of such car which appear to be in good condition are in such condition?" The court, after a citation and discussion of certain cases, came to the conclusion that this last question should be answered in the affirmative. Taylor, J., dissented.

In *Chicago & Alton R. R. Co. v. Bragonier*, 11. Brad. (Ill. App.) 516, the plaintiff's intestate, a brakeman in defendant railroad company's employment, was killed while coupling cars. The accident was caused by reason of the ratchet and dog of the brake on one of the cars to be coupled being defective. The car in question belonged to another road and had been received upon the defendant's track at Joliet; the next day it passed through B., arriving at J. the following day, where it remained four days. Then it was conveyed through R. to W., where the injury occurred, after the car had been in the control of the company six days. There were inspecting stations at Joliet, B., and R. It was held that if the defect in question was such as the inspectors could have discovered by the exercise of due diligence, the company would be liable; but that if the defect was one which would only appear when the car was moving, and hence could not have been discovered by the inspectors by exercise of such due diligence, the company would not be liable. This case seems clearly to hold that in respect to foreign cars, the company transporting them does not warrant that they are free from latent defects which a thorough testing of the car would disclose; but that its only duty (as to its employees) in regard to them, is to have them properly inspected.

In this case it was held that if there was negligence on the part of the inspectors in not discovering the defect, the plaintiff was entitled to recover on the ground that the inspectors were not fellow-servants of deceased. In *Mackin v. Boston, etc., R. R. Co.*, 135 Mass. 201; s. c., 15 Am. & Eng. R. R. Cas. 196, the court also held that the only duty the company owed to its employees as to foreign cars was to provide suitable inspectors; but the court further held that such inspectors and the plaintiff (a brakeman) were fellow-servants, and, hence, that plaintiff could not recover for the negligence of an inspector in not rejecting a patently unsafe car. Accord, see *Smith v. Potter*, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140.

The most important and the best-reasoned case on the duty of a railroad company as to the inspection of "foreign" cars is the case of *Richardson v. Great Eastern Ry. Co.*, L. R. 10 C. P. 486, reversed in L. R. 1 C. P. D. 342. In that case the plaintiff, a passenger riding on defendant's road, was injured by the car in which he was riding being struck by the "break van" of a passing coal train. The accident was caused by a defect in the axle of a coal car in the coal train which caused the axle to break, and resulted in throwing the "brake vans" off the rails and against the passenger train. The coal car in question belonged to the B. Wagon Co., but that company had leased it to a colliery company. It was received into the defendant's line for transportation at Peterborough from the Midland Ry. Co., and was loaded with coal at the time. The *Great Eastern Ry.*

was in the habit of receiving a large number of cars from other roads at Peterborough—as many as 25,000 weekly. On arrival at Peterborough, foreign cars were inspected by the company by hammering the tires of wheels and by a general overlooking of the cars. On the arrival of the car in question at Peterborough it was inspected and two defects were discovered. The camber of one of the springs was off, and one of the timbers was cracked. The defect in the axle, a crack one and a quarter inches deep and extending to the surface of the axle, was not discovered, and could not have been discovered without scraping the grease and dirt off the axle and minutely examining it. The car was sent to the B. Wagon Co. for repairs. They replaced the camber, but as to the crack in the timber, inasmuch as it did not make the car unsafe and as the repairing of it would involve unloading the car, the B. Wagon Co. did not repair it, but wrote on the car "Stop at Peterborough for repairs when empty." The car was then redelivered to defendant for transportation to London, and the accident occurred while car was being thus transported. The jury brought in a special verdict. The jury were asked: First, whether the defect in the axle was discoverable upon any fit and careful examination of it; they answered "yes." Second, whether it was the duty of the company to examine the axle by scraping off the dirt and minutely looking at it—so minutely as to enable them to see the crack, and so to prevent or remedy the mischief; to which the jury answered "no." Third, if that was not their duty upon the first view of the truck, did it become their duty when, on having discovered the defects in the spring and in the timber, they ordered the car to be repaired, and it remained upon their premises four or five days for that purpose. To this the jury answered that it was their duty to require of the B. Wagon Co. some distinct assurance that it had been examined and repaired. The Court of Common Pleas held that the plaintiff was entitled to a judgment on the special findings. Lord Coleridge bases his opinion on the omission of the company to satisfy itself that the B. Wagon Co. had made a thorough examination of the car, in accordance with its duty as found by the jury in their third finding. This judgment was reversed by the Court of Appeals, and a judgment was ordered for the defendant. The court held that on the first two findings the defendant was entitled to a judgment; that the third finding must be thrown out, for the reason that there was no evidence authorizing the jury to find that it was the duty of the company to satisfy itself that due repairs and examination had been made by the B. Wagon Co. The remarks of Jessel, M. R. on the duty of the company as to the inspection of foreign cars is instructive. He says: "The real question is whether the company were guilty of negligence in not making a more minute examination; for there is no doubt that the crack, having reached the surface, might have been discovered by a sufficiently minute examination. We must look to what is reasonable in reference to the exigencies of the case. The company cannot stop all foreign trucks (cars) and empty them for the purpose of a minute examination. If they were entitled to do so, it would practically destroy the right given by statute (8 & 9 Vict., c. 20, s. 92) to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company so to treat the foreign trucks as to destroy the very object for which they were sent on to the line,—viz., for the purpose of through-traffic. There must be some reasonable limit to the amount of examination required, and the substantial question was whether the mode of examination adopted by the company was reasonably satisfactory. It appears to me that the jury did answer that question substantially in defendant's favor.

**Concluding Remarks.**—From these authorities, and ordinary common-sense would seem to point to the same conclusion, it is clear that a rail-

road is not bound to submit foreign cars to the same rigid tests to which it would be required to submit a new car before using it. That the nature of the examination of foreign cars must depend upon circumstances, it cannot be such as must necessarily interfere with the traffic or business of the road. That whether a company has made an inspection of the car as thorough and careful as under the circumstances of the case it was bound to make, is a question for the jury to decide in the light of the special facts of the case.

**Brakeman and Car-inspectors not Fellow-servants. Brakeman Killed by Giving-away of Hand-hold. Company Liable.**—A case in West Virginia presents so thorough and valuable a discussion of the law of master and servant, and as to who are fellow-servants, that we append it herewith. The injury resulted in death under the following circumstances: Patton, a brakeman, was ordered to uncouple and detach the locomotive from the rest of the train, and then to climb to the top of car 4444 and brake the train so as to stop it at the station. He uncoupled the engine and car, and while using a "hand-hold" in climbing to the top of the car, it broke loose and separated from the car, and he fell under the wheels and was killed. It was shown that the company was negligent in failing to inspect the car so as to discover the condition of the hand-hold, and judgment against the company was accordingly affirmed. Discussing the law, Woods, J., said:

Under what circumstances is the common master liable to one servant for injuries caused by the negligence of a fellow-servant in the same general employment?

The general rule on this subject has been laid down by different courts and text-writers with various degrees of precision, some almost totally exempting the master from liability and others attempting to extend it, so as to embrace almost every degree of negligence of a fellow-servant, whether engaged in the same department as the servant injured, or in another and wholly different department.

Shearman & Redfield on Negligence, sec. 86, lays down the rule as follows: "A master is not liable to his servant for the negligence of a fellow-servant while engaged in the same common employment, unless he has been negligent in the selection of the servant in fault, or in retaining him after notice of his incompetency;" but they admit that very grave objections have been made to the doctrine as above laid down.

In *Abraham v. Reynolds*, 5 H. & N. 143, the rule is laid down by Pollock, C. B., still more broadly: "When two persons serve the same master, one cannot sue the master for the negligence of his fellow-servant. The rule applies to every establishment. No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect to which, if he had been a stranger, he might have had a right of action."

The rule as laid down in Wharton's Law of Negligence, section 224, is identical with that laid down by Shearman & Redfield, *supra*. Wood avoids laying down the rule in terms, but declares the doctrine applicable in such cases, as follows: "When a servant enters into the employ of another, he assumes all the risks ordinarily incident to the business. He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment; consequently he cannot recover for injuries resulting to him therefrom. In all engagements of that character the servant assumes those risks which are incident to the service, and as between himself and the master he is supposed to have contracted on those terms. If an injury is sustained by the servant in that service, it is regarded as an accident, a mere casualty, and the misfortune must rest on him." But that text-writer qualifies the rule by adding that "the master is bound to the exercise of reasonable care in reference to all the appliances of the business, and is bound to

protect his servants from injury therefrom of latent or unseen defects, so far as human care and foresight can accomplish that result, but he does not stand in the relation of an insurer to the servant, and can only be held chargeable when negligence can properly be imputed to him. The servant is bound to see for himself such risks and hazards as are patent; but where the danger is not patent he has a right to presume that the master has discharged his duty, and that the appliances of the business are reasonably safe, and free from hazard." Wood's Law of Master and Servant, sec. 326.

Chief Justice Shaw, in *Farwell v. Boston & Worcester R. R. Corporation*, reported in 4 Metc. 49, says the general rule is that "he who engages in the employment of another, for the performance of specified duties for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness or ignorance of those who are in the same employment. These are perils which the servant is as likely to know and against which he can as effectually guard as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other." This statement of the rule is exceedingly broad, and in effect declares the master to be wholly exempt from responsibility of any injury resulting from the negligence of any fellow-servant who may be engaged in the same employment. The case then before the learned judge (who announced this doctrine) presented only the question whether the plaintiff, who was an engineer on the defendant's railroad, could hold it responsible for any injury sustained by him by negligence of the defendant's switchman, who had long been in its employ, and who was known to the plaintiff to be a careful and trustworthy servant, and where he and the plaintiff had both been appointed by the same superintendent. This case was decided in 1842, when the present gigantic system of railroads which now traverse the several States was in its infancy, and rested mainly on the authority of Lord Abinger, C. B., in the case of *Priestly v. Fowler*, decided in England in 1837, which was an action brought by a servant against his master, who was injured by the breaking-down of a van in which the master had ordered him to go with his goods, caused by the negligence of his fellow-servant in overloading the van. In this case the plaintiff was not permitted to recover upon the broad ground that there was no precedent for such an action by a servant against his master. But even in that case the learned judge felt himself bound to add that there is no doubt the master is bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself, and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, described in the declaration in that case, the plaintiff must have known as well or perhaps even better than his master that the van was overloaded. With due deference to the authority of so learned a judge, it seems to us that the facts of the case scarcely warranted, and they certainly did not call for, the laying-down of a rule of universal application, when it was apparent that the injury to the plaintiff was clearly the result of his own inexcusable negligence; for before he entered the van he must have seen and known that it was overloaded, and for this reason he was not entitled to recover. And Chief Justice Shaw, in reaching the conclusion announced in 4 Metc., *supra*, seemed conscious that the rule as laid down by him might be understood as declaring the master totally exempt from liability to a servant for injuries caused by the negligence of his fellow-servant, and he therefore felt it necessary to add a caution against any

hasty conclusion as to the application of this rule to cases not within the same principle, "for it may be varied and modified by circumstances which did not appear in that case, where no wilful wrong or actual negligence was imputed to the defendant, and where suitable means were furnished and suitable persons employed to accomplish the end in view." "We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant."

There seems to be no conflict among the authorities that where the injuries complained of have been caused to the servant by the direct act or negligence of the master himself, he is liable; nor is the rule different when the wrong or negligence which caused the injury was the act of an agent who occupied the place of the master, for then the master is deemed to be present, and is consequently liable for the manner in which it is performed. *Flike, Adm'r, v. Boston & Albany R. R. Co.*, 53 N. Y. 549; *Ryan v. Fowler*, 24 N. Y. 410; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Gilman v. Easton R. R. Co.*, 10 Allen, 286.

Where a master places the entire charge of his business, or a distinct department of it, in the hands of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect of the agent of ordinary care in supplying and maintaining suitable instrumentalities for the work required to be done is a breach of duty for which the master should be held liable. In such a case the negligence of the agent is the negligence of the principal. *Snyder v. Philadelphia*, 78 Pa. 25; *Whar. L. of Negl.* § 229.

But what is the duty of the master to his servant employed by him in a perilous employment? The ordinary risks and perils incident to the employment which the servant can foresee, or shun, or avoid, or guard against by prudence, skill, and forecast, are assumed by him, and they are supposed to enter into the consideration to be received by him for his services. But before the services of the servant, in many employments, can commence, many duties must be performed, many agencies must be set to work by the master, and these duties and agencies must be continuously performed and employed so long as the general business is continued. With railroads these duties are perpetual. Constructed at enormous expense, furnished with engines and machinery of the most costly and substantial character, supplied with every appliance which experience can suggest or science and skill construct, tending to insure the safety of travellers and merchandise, running with the greatest speed, day and night, requiring the duties of those in charge of their trains to be instantly performed, it would seem upon reason and principle that the corporation, the general master of all these employees, in all its various departments, should be held accountable for any failure to furnish to its servants, and keep in safe repair all such usual appliances as are necessary for the performance of the servants' duties, with such reasonable degree of safety that the ordinary risks and perils of the employment may not be increased. If having furnished such machinery and appliances, the master, by himself or his agents, whose duty it is to keep them in proper repair, suffer the same to be and remain out of repair, in an unsafe and unsound condition, by long continued use or otherwise, and this fact be not known to the servant, and injury results to him from the proper use of these appliances without negligence on his part while in the performance of his duty, the master is liable, because it was his duty to keep such machinery and appliances in good repair and in safe condition. Neither ought he to be permitted to screen himself from liability, because he did not in fact know that the same were out of repair, if by the exercise of ordinary care and inspection by persons skilled in the knowledge of such machinery and appliances, such defects might have been discovered and repaired.

These views are supported by the authority of many cases, adjudicated since that in 4 Metc., *supra*. In *Snow v. Housatonic R. R. Co.*, 8 Allen, 441,

Snow was injured while uncoupling cars of the Western Railroad Company at a point where the latter had the right to use the road and switches of the defendant at a place where its road crossed the public highway where it had laid down three lengths of plank between its rails the whole width of the highway; for two months before the accident one of these planks had in it a hole in which the plaintiff's foot was caught and crushed by the cars, while in the performance of his duty. For this injury he sued the defendant, and it was held liable. Justice Bigelow, delivering the opinion of the court in that case, said: "It is certainly most just and reasonable, that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen, by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of these they could not foresee. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight, and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which, he ought, in justice and sound reason, to be responsible."

In *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, it was held that where an engineer employed by the defendant to drive a locomotive over its road was injured by an explosion caused by a defect in the engine, which was due to the neglect of the defendant's agents who were charged with the duty of keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetency on the part of its agents, the defendant was held liable for the damages sustained by the plaintiff by such defect in the engine. In this case the defendant insisted, that as the master mechanic whose duty it was to keep the engine in repair, was a fellow-servant of the plaintiff, the defendant was not liable for the negligence of the master mechanic in failing to keep the engine in repair, but it was held liable for the injury caused by such negligence; and the court held the rules of law to be well settled, that a servant by entering his master's service assumes all the risks of that service which the master exercising due care cannot control, including those arising from the negligence of his fellow-servants; but that the master is bound to use ordinary care in providing suitable structures and engines, and proper servants to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exercise in procuring, keeping, and maintaining such servants, structures and engines. If he knows, or, by the exercise of due care, might have known, that his servants, structures, or engines are, either at the time of procuring them, or at any subsequent time, incompetent or defective, he fails in his duty; and he cannot divest himself of this duty of having suitable instruments of any kind by delegating to an agent their employment or selection, their superintendence or repair. And in a subsequent part of his opinion the learned judge adds: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer, from the exercise of ordinary care, in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which, when the employer is a corporation, must always be discharged by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not in the true sense of the rule relied on to be regarded as fellow-servants of those who are engaged in operating

it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them. In one the master cannot escape the consequence of the agents' negligence; if the servant is injured in the other, he may." "A corporation must perform this duty through officers and superintendents; but the duty is the duty of the corporation, and not theirs, and for neglect of this duty, in this respect, the corporation is responsible."

In *Fike, Adm'r, v. Boston & Albany R. R. Co.*, 58 N. Y. 549, where the plaintiff's intestate, who was a fireman on a freight train of the defendant, was killed by a collision with part of another freight train of the defendant, which had been negligently sent out by its despatcher of trains without a sufficient number of brakemen, and, having broken in two, on a steep grade, the hinder half of the train became unmanageable and ran down the grade and thus caused the collision, the defendant was held liable.

In *C. & N. W. R. R. Co. v. Taylor*, 69 Ill. 461—where the switch-tender while attempting to make a flying switch was killed by the advancing car, on which there was no light at the front end of the cars, and it was otherwise too dark to see them—the railroad company was held liable; and Chief Justice Bruce, delivering the opinion of the court, said the "railroad company impliedly contracted with the deceased that it would use due care in providing such machinery, apparatus, and appliances, and other necessary means suitable and proper to the prosecution of the business in which its servants were engaged, so as to insure a reasonable degree of safety to life and security against injury."

In the case of *Chicago & N. W. R. R. Co. v. Jackson*, 55 Ill. 492, Jackson, who was a brakeman on the appellant's railway, while engaged in the discharge of his duty and being on the end of a freight car holding to an iron rod, in obeying the order of his superior in attempting to descend from the car for the purpose of uncoupling it from the engine, while in motion, swung himself around so as to descend by a ladder on the side of the car, but owing to the fact that it was out of repair, lacking two rounds that were missing, he failed to get a hold for his feet, and the weight of his body broke his hold of the iron rod when he fell to the ground, and the engine, which was backing at the time, passed over both his legs, rendering amputation thereof necessary. The defence was that the plaintiff was guilty of contributory negligence, knowing as he did the deficiency in the ladder. It did not appear that the plaintiff ever saw that car before, or that he knew the condition of the ladder, and as the jury found for the plaintiff the appellate court held that there was not sufficient proof before the jury to charge him with knowledge of the defect, and the company was held liable. Justice W lker, in delivering the opinion of the court, announced the law to be that "it is the duty of these companies to furnish their employees safe materials and structures. Such an obligation is permanent, and cannot be avoided by them by delegating the power to others, and the understanding with their servants is direct that they will furnish suitable and safe materials and structures. This car was placed upon the road by some one superior to the plaintiff in authority, and he was acting under such authority. He had no choice but to obey orders, and he was compelled by those above him in authority to ascend the car, and again descend and uncouple the car from the engine, when required. He was not, and could not be, responsible for the defect. Hence in this case the plaintiff should not be prejudiced by the negligence of those having charge of the inspection and repairs of the cars, as they were superior to him in authority." See also *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197. A brakeman who is negligently required to handle cars out of repair, unfit for use, and dangerous, and is injured without fault on his part, may recover damages from the company. He has a right to assume that the cars which he is required to couple are in a proper



state for such handling. It is the duty of the master to furnish his employees with proper machinery or instrumentalities for their use in the work assigned them, and to see that the same are kept in reasonably safe condition or repair. He may intrust this duty to others, but it is still his duty; and he cannot, by doing so, escape the responsibility for its negligent non-performance. The acts of his agents in this regard are his acts; their negligence is his negligence. *King v. O. & Miss. R. R. Co.*, 18 Am. & Eng. R. R. Cas 386.

In the case of *Toledo & Wabash R. R. Co. v. Ingraham*, 77 Ill. 809, the circumstances of the case were almost identical with those in *Chicago & N. W. R. R. Co.*, 55 Ill., *supra*, and the court again held the defendant liable, although there was no proof that there was any visible defect in the ladder or that the plaintiff had ever seen that car before the time the accident occurred.

The case of *Brann v. The C., R. I. & P. R. R. Co.*, 53 Iowa, 595, was one similar in all respects to the one under our consideration. The plaintiff was in the employ of the defendant as a brakeman on one of its freight trains. On one of these cars was a ladder and also a hand-hold for the purpose of aiding the employees to reach the ladder ascending or descending. The hand-hold was out of repair; "the defect was a loose bolt or screw on one end that assisted in retaining the hand-hold in position." The car had been taken into the defendant's train at Beverly, Mo., on the 12th of October, 1876, from a connecting road, and was taken to Chicago and it was on its return trip on the 17th of October when the accident occurred. There was no evidence that the defendant had any car-inspector either at Chicago or between that place and Beverly. In this case there were verdict and judgment in favor of the defendant under the ruling of the trial-court. But the supreme court reversed this judgment and held "that it is the duty of a railroad company not only to furnish reasonably well constructed and safe machinery and appliances for the use of the employees operating its road, but to exercise a continued supervision over the same to keep them in proper repair; that the duty of inspection is affirmative and must be continuously fulfilled and positively performed; that as such a corporation must act through its agents and employees, the negligence of the employee upon whom the duty of inspection is devolved is the negligence of the corporation. The brakemen on freight trains and such inspector cannot be regarded as co-employees in such sense as to prevent the former from recovering of the corporation, because of the negligence of the latter." See also *King v. O. & Miss. R. R. Co.*, *supra*.

This question was before the Supreme Court of the United States in the case of *Hough v. Railroad Co.*, upon a writ of error from the circuit court for the Western District of Texas. The suit was brought by the widow and child against the Pacific R. R. Co. to recover damages on account of the death of W. C. Hough while in its employment as an engineer. The engine coming in contact with some animal was thrown from the track over an embankment whereby the whistle was knocked off or blown from the boiler, and from the opening thus made the deceased was scalded to death. The negligence alleged was that the whistle was insecurely fastened to the boiler and that the engine was thrown from the track because the cow-catcher was defective, and that these defects were owing to the negligence of the defendant's master mechanic and of the foreman of the round-house at Marshall, to whom was committed the exclusive management of the defendant's motive power, with full control over the engineers; and all these defects were made known to him, and that he promised to repair them, which he failed to do. The principal ground of defence was that if any of the alleged defects existed, it was because of the negligence of the master mechanic and the foreman of the round-house, for which negligence the company claimed it was

not liable. The evidence tended strongly to show the facts to be as alleged by the plaintiffs, and that the defects were caused by the negligence of the defendant's master mechanic and foreman. Upon this state of facts the circuit court, in effect, instructed the jury that they must find for the defendant. Harlan, Justice, delivering the opinion of the supreme court of the United States, after a full review of the leading cases in many of the State courts, and in the courts in England, says: "A railroad corporation may be controlled by competent, watchful, and prudent directors who exercise the greatest caution in the selection of a superintendent, under whose supervision and orders its affairs and business in all its departments are conducted. The latter in turn may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain in suitable condition the machinery and apparatus to be used by its employees. Those (persons) in the organization of the corporation who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot in respect of such matters interpose between it and the servant who has been injured, without fault on his part, the personal responsibility of an agent, who, in exercising the master's authority, has violated the duty he owes as well to the servant as to the corporation." It was accordingly held in that case that a railroad company is liable when its officers or agents who are invested with a controlling or superior duty in that regard are, in discharging it, guilty of negligence from which injury to an innocent party results.

To entitle a brakeman to recover of a railroad company damages for an injury sustained by him while in its employ, the burden is upon him to show the negligence of the company. But he is not bound to do more than to raise a reasonable presumption of negligence on the part of the company. *Greenleaf v. C. Ill. R. R. Co.*, 29 Ia. 14; *Shear. & Red. on Negligence*, sec. 99.

From an examination of the authorities, the reasoning of the judges, as well as upon sound reason and considerations of public policy, we conclude that it is the duty of a railroad company, not only to furnish reasonably well constructed and safe machinery and appliances for its cars, for the use of its employees engaged in operating its road, but also to exercise continual supervision over the same to keep them in good and safe repair; and that it cannot divest itself of duty nor relieve itself from responsibility for its non-performance by delegating itself to any subordinate officer or servant in any of its departments; and if it does delegate this duty to any of its servants vested with controlling or superior authority in regard thereto, the negligence of such servant is the negligence of the company.

If such company or its servant to whom it has delegated the performance of said duty suffer such machinery, cars, or appliances, either from long-continued use or any other cause, to become unsound, unsafe, or defective, and this unsoundness and defective condition are known to the company, or by the exercise of due care and diligence it might have become known to it, and injury therefrom results to one of its employees, without any fault of his, while in the performance of his duty, the company is responsible to such servant for such injury; and that to guard against accidents resulting from such defects in its machinery, cars, and appliances, it is the duty of the company to have the same continuously inspected by persons competent to perform that duty. And, as the company must act through its agents and employees, the negligence of the employee charged with the duty of inspection, or of the master mechanic charged with the duty of keeping the machinery cars, and appliances in repair, is the negligence of the railroad company itself; and a brakeman on one of its freight trains and such inspector or master mechanic cannot be regarded as fellow-servants in such a sense as to prevent the

brakeman from recovering of the corporation for an injury sustained by him because of the negligence of such inspector or master mechanic.

If, therefore, one of the brakemen in the employ of a railroad company while in the discharge of his duty, and without any fault on his part, is injured by the breaking loose or giving-way of a hand-hold or any other appliance attached to its car and used to assist such brakeman in the performance of his duty, and such defect was one that could have been discovered by a careful inspection of the car, and repaired, such railroad company is liable to such brakeman for the injury sustained by him although the proximate cause of the injury was a result of the negligence of the inspector or of the master mechanic charged with the duty of inspecting and keeping such hand-hold in repair.

It follows from these deductions that the defendant in the case under consideration, at the time the plaintiff's intestate was killed, was guilty of negligence in failing to inspect said car No. "4444" before or at the time it was taken into its freight train before daylight on June 17, 1879, whereby the defective and dangerous condition of said hand-hold would have been discovered and the injury to the deceased avoided; and especially when it must have known, as the evidence clearly showed, that the car was an old one, and had at that time been in use for more than eight years, and that the company for this negligence was liable to the plaintiff's action. *Cooper v. Pittsburgh, C. & St. L. R. R. Co.*, \*24 W. Va. 87. See also *Missouri Pacific R. R. Co. v. Condon*, 17 Am. and Eng. R. R. Cas. 589.

## TEXAS AND PACIFIC R. R. Co.

v.

HARRINGTON.

(62 *Texas Reports*, 597.)

Where the petition states that a railway company's engine moved rapidly through the company's yard, without any lookout upon it, whereby injury resulted to plaintiff, a servant of the company, such an allegation does not necessarily impute negligence to the company.

The mere fact that one is injured by a locomotive operated by an engineer, who is shown to have been near-sighted, will not of itself establish negligence on the part of the company in retaining him in its employment.

Where two servants are employed by the same master, labor under the same control, derive their authority and receive their compensation from a common source, and are engaged in the same business, though in different departments of the common service, they are fellow-servants. This principle applied in a case where a car-repairer was injured by the fault of parties in charge of an engine.

In a suit for compensation by the wife against a railroad company for the loss of her husband, her statements as to her pecuniary condition are inadmissible.

APPEAL from Marion.

*James Turner* for appellant.

*Todd & Eldridge* and *Chas. A. Oulberson* for appellee.

WATTS, J.—As grounds for recovery in this case, appellee alleged two distinct acts of negligence against the company. First, that the engine which ran over and killed Harrington was being **FACTS.** moved rapidly through the yard at the time, and there was no lookout upon it. Secondly, that the engineer then in charge of the engine was incompetent, and not a suitable person for that service, because, as alleged, he “was and is much weakened, injured, and impaired in his eyesight and powers of vision, being very near-sighted and unable to see at all without spectacles or glasses.” And that this was known to the company, or by the exercise of reasonable care ought to have been so known, long before Harrington was killed.

It is claimed that if either of these imputed acts of negligence, as alleged, is true, the other necessary facts concurring would render the company liable.

From the fact that an engine may have been moved rapidly **MOVING ENGINE RAPIDLY THROUGH YARD WITHOUT LOOK-OUT NOT NEGLIGENCE PER SE** through the yard without any lookout being upon it, negligence is not necessarily imputable to the company. Suitable lookouts may have been provided by the company, but from the negligence of the fellow-servants of Harrington, and without fault of the company, they may not have been in the proper place. In such cases, to render the company liable, the negligence must be imputable to it, and not to some co-employee who comes within the rule of fellow-servant. Therefore, it should have been alleged that the failure to have suitable lookouts upon the engine was chargeable to the company.

But the other charge of negligence is sufficient to warrant a recovery against the company, provided the other necessary facts concurred. For if, as charged, the engineer was incompetent and not suitable for the service, on account of impaired **NEGLECTANCE TO RETAIN ENGINEER WHOSE VISION IS IMPAIRED.** vision, and that fact was either known or might have been known to the company by the exercise of reasonable care, the further allegation that the engineer “being very near-sighted and unable to see at all without spectacles or glasses,” would not have the effect to contradict the other allegations and render the whole subject to demurrer. The latter allegation does not, as claimed, imply that Lottier could, with the use of spectacles or glasses, see sufficiently well to discharge the duty of an engineer. The direct charge that he was incompetent and unsuitable for that place, on account of impaired vision, was not qualified and destroyed, as claimed, by the other allegation.

It is the universal rule that corporations, like natural persons, are liable to their employees for injuries resulting from failure to exercise reasonable care in selecting their co-employees, or for retaining such co-employees in the service, when it is known, or by the use of reasonable care might have been known, to the corporation that they were negligent or inefficient.

If, then, as alleged, Lottier was not suitable for the place on account of impaired vision, and this fact was known or might have been known to the corporation by the exercise of reasonable care, then it would be liable for injuries resulting to its other servants from that cause.

In operating engines, etc., upon the yard, so far as strangers are concerned, the company is not held to the same degree of care as at public crossings. That results from the fact that on the yards and along the track at points other than public crossings, third persons are not expected to go; hence the servants of the company are not held to anticipate their presence and to provide against inflicting injury upon them. *Baltimore & Ohio R. R. Co. v. Depew*, 12 Am. & Eng. R. R. Cas. 64.

It is also true that the employee, in accepting the service, is held to assume the risks incident to the employment. But he does not assume, in addition, those which may be superadded by the wrongful or negligent acts of the master. As was said in *T. & P. R. R. Co. v. Burns*, 4 Law Rev. 57, "when the company has exercised reasonable care in making provisions for the safety of its employees, this is all that is required." What would constitute such reasonable care would depend upon the nature of the service and its attendant risks.

When Harrington engaged in the service he accepted and assumed the risks incident to the employment; that is, the risks ordinarily incident to such a service upon the yard. He was required to exercise reasonable care in the discharge of the duty, so as to avoid being injured, on the one hand, and the company was required, on the other, to exercise reasonable care in providing and maintaining suitable and safe instrumentalities, and to exercise like care in selecting his co-employees or fellow-servants.

In these respects, if the company had exercised reasonable care it would not be liable for a mistake in judgment. But if the company, after selecting such servants, knew, or ought to have known, that any of them were negligent, incompetent, or unsafe, it then became its duty to discharge such servant, and, on failure to do so, the company would ordinarily be liable to its other employees for any injury resulting from the negligence or incompetency of such servant.

Obviously, Harrington's service upon the yard was attended by considerable risk; he must have been familiar with all its operations and cognizant of the dangers ordinarily attending that service. He must have known that the several tracks in the yard were being frequently used in running engines and trains over them, and must have known the danger attending the walking upon such tracks. On the other hand, the company was also aware of the dangers to which he was exposed in the discharge of the duties of the place. Hence Harrington, upon his part, was

required to exercise the same degree of care and prudence in protecting himself from danger as a reasonably prudent person would have exercised under like conditions and circumstances; and, on the other hand, the company was bound to exercise the same degree of care and prudence in protecting him from injury.

As to whether, in this case, either or both had been duly careful or remiss in respect to the matter is a question of fact to be determined from the evidence.

Without intending to indicate any opinion as to the weight of the evidence upon that issue, it should be observed that the mere fact that a person is near-sighted would not necessarily unfit him for the position of locomotive engineer. If by the use of proper glasses he can see sufficiently well to enable him to discharge all the duties devolving upon an engineer in operating an engine, and he in fact used such glasses, the company would not be considered as negligent on that account by retaining him in its service.

It is the settled doctrine in this State that when employees serve the same master, labor under the same control, derive their authority and receive their compensation from the same common source, and are engaged in the same general business, notwithstanding they may operate in different or distinct grades or departments of the common service, they are nevertheless fellow-servants. *Dallas v. G., C. & S. F. R. R. Co.*, 61 Tex. 196; *s. c.*, *infra*, *H. & T. C. R. R. Co. v. Rider*, 4 Law Rev. 292.

Under that rule, it would seem to admit of no question that Harrington, whose duty required him to oil car wheels, axles, etc., of cars on different tracks in the yard, and Lottier, whose duty required him to move engines through the yard, to and from the round-house, were fellow-servants, engaged in the same general business.

Upon the trial, Mrs. Harrington, as a witness in her own behalf, and over the several objections of appellant's counsel, was permitted to testify "that she was very poor, that they had no means of support except the labor of her husband, and that she had no means of supporting or educating her children." In explanation of the ruling the court said, "The evidence was submitted as tending to show the expectation of plaintiff's pecuniary aid from deceased."

It was a legal obligation resting upon Harrington to support his wife and to support and educate his children. The law imposed the duty, and no other presumption than compliance on his part would be indulged. This is not a suit for contributions which might or might not have continued if the party had lived, but a suit for compensation for the loss of husband and father, whose duty it was to furnish support, etc.

That evidence was not admissible in this case, and was calculated

to prejudice the rights of appellant. *I. & G. N. R. R. Co. v. Kindred*, 11 Am. & Eng. R. R. Cas. 649; *Pennsylvania R. R. Co. v. Roy*, 12 Otto (U. S.), 451; s. c., 1 Am. & Eng. R. R. Cas. 225; *T. & P. R. R. Co. v. Burns*, *supra*.

As this evidence was improperly admitted over the objections of appellant, properly interposed, and as it cannot be determined that appellant was not injured thereby, the judgment ought to be reversed.

The other questions presented by the assignment of errors need not be discussed.

Our conclusion is that the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

**Car-repairer under Car—Duty of Co-employees as to Guarding him from Injury.**—In an action for an injury to an employee while under a car it was shown that three other employees were standing by, and that, while there was no express rule or regulation of the company so to do, there was yet a custom abundantly proved and defined by the court to be a sort of common law of the company, obligatory upon its employees, and as thoroughly understood by them as though it had been embodied in the printed regulations and read by the officers of the company to them, to watch for the safety of other employees working under cars upon the tracks. The jury found that such was not the rule or custom of the company, which finding the court held to be wholly unsupported by the evidence, and hence reversed a judgment based thereon, and remanded the case for a new trial. *Luebke v. Chicago, M. & St. P. R. R. Co.*, \* Wisconsin, April 28, 1885.

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## DALLAS

v.

GULF, COLORADO AND SANTA FE R. R. Co.

(61 Texas Reports, 196.)

A railroad company is not liable in damages for injury inflicted on one of its servants resulting from the performance of duties incident to the employment; nor is it liable for injuries resulting from the negligence of a co-servant, unless it be shown that such co-servant was incompetent and unworthy of trust, and that the company knew it.

An employee of a railway company, employed by the month to watch its ties along the road, to prevent their destruction, went in obedience to orders from his employer to procure a deed in favor of the company, and voluntarily got on its train, and after performing the duty was voluntarily returning on its train, when the train was thrown from the track and the employee injured. *Held*, that there was no error in a charge which instructed the jury that under such circumstances, no other facts being shown, the company was not liable in damages.

APPEAL from Washington. Tried below before the Hon. I. B. McFarland.

Suit instituted by appellant. The petition alleged in substance that plaintiff had been employed by defendant to guard the property of defendant, and especially to find out who had burned and destroyed a lot of ties, and to prevent the burning and destruction of other ties and property of defendant along its railroad and right of way from the Yegua creek to the town of Caldwell in Burleson county. That in the discharge of said duties he was required to ride on horseback along the line of road from the end of the track, then about ten miles north of Brenham, to the town of Caldwell. For this service he was paid \$100 per month, and the board of himself and horse; that on the occasion of the accident he had been ordered to perform other and different service from that above mentioned, which service required him to ride on defendant's construction train; and while so riding he was injured by the cars being thrown from the track. Alleged negligence, in the management of the train, and sought to recover damages for his injuries.

Defendant filed general and special demurrers, general denial, and pleaded specially that plaintiff was a servant and employee and could not recover for negligence of a fellow-servant; that he went on the construction train voluntarily, without being required to do so; that the train was well manned with competent, skilful, and sober employees; that there was no negligence; that plaintiff had been accustomed to ride on the construction train voluntarily and against his orders, well knowing the danger, etc.

Verdict and judgment for defendant.

The plaintiff went on the train to Brenham, and, having procured the execution and acknowledgment of a deed for appellee, in his employment, he on the morning of August 25, 1880, got on the defendant's train of cars at Brenham to return to Caldwell to have the deed recorded. The train consisted of a locomotive and nine flat-cars, loaded with railroad iron, spikes, and other material, and was in charge of the engineer, Sol Bills, and there were also two brakemen on the train. The plaintiff with four or five other persons got on the rear car and remained there until thrown off. When the train got about ten miles north of Brenham a cow was run over, and several cars, including that on which the plaintiff was riding, were thrown from the track, and the plaintiff was very seriously injured. His right thigh was broken and the bone split, and he was also badly bruised and hurt, and had never recovered from said injuries.

The court charged the jury, among other things, as follows:

... 3. The railroad company, as a general rule, would not be responsible for injuries received by one of its servants while in the regular discharge of his duties by an accident resulting from a



danger common to the employment, nor would it be held answerable for injuries resulting from the negligence of another of his co-servants, unless it shows that such other servant was incompetent and unworthy of trust, and that the company knew it.

4. The jury will therefore determine from the evidence, first, whether the plaintiff Dallas, at the time he received the injury, was acting as a servant of the company.

5. Upon this subject you are charged that if you believe, from the evidence, that the plaintiff Dallas was in the employ of the company watching its ties along said road, and that, while so employed, he, in obedience to orders to proceed to a point a few miles from Brenham, and procure a deed in favor of the company from another party, voluntarily got on defendant's train and went to Brenham, and, after having procured the deed as directed, he voluntarily started on defendant's train to return to Caldwell, where the deed was to be recorded, he was acting in the employ of the company, and was then acting as a servant of the company, and cannot recover in this action.

6. If, on the other hand, you believe from the evidence that plaintiff was not acting as a co-servant of other employees and servants of the company at the time he received the injury, and if you further believe from the evidence that the accident was caused by the negligent conduct of the locomotive engineer, then you will find for plaintiff and allow him such damages as you may think him entitled to under the proof, taking into consideration the age and strength of the plaintiff, and his ability to earn a living at the time he received the injury, as compared with his present condition, and the amount of injuries actually received, first giving the defendant credit for such amounts as have been paid to the plaintiff, since the accident, in the way of wages, doctor's bills, nurse-hire, etc.

The following charges were given at the instance of the defendant:

1. Ordinarily an employee cannot recover damages of his employer for injury received in his employment through the negligence or carelessness of another employee. And the fact that the person injured may not be engaged in the same labor or line of employment with him whose negligence caused the injury does not change the rule of law, provided they in any manner co-operate in the same general business and are subject to the same general direction and control. The real test of co-service is subjection to the same general control, and co-operation to secure a common result, if there is a natural or necessary connection between the different classes of service, such as necessarily brings the servants into contact with each other in the prosecution of their work, however dissimilar their occupation may be. Therefore, I charge you that if you believe from the evidence that the plaintiff was an em-

ployee of the defendant, and engaged to perform services connected with or in aid of the construction and extension of the defendant's railway north of Brenham, and that in the performance of his duties he was accustomed to ride without charge and at his own will upon the construction train of defendant along said line, and that he was so in the employ of the defendant at the time he was injured, you will find a verdict for the defendant, notwithstanding you may believe that the plaintiff's injuries were caused by the negligence of the locomotive engineer.

*Breedlove & Ewing* for appellant.

*Ballinger, Mott & Terry* for appellees.

WEST, A. J.—Without setting forth at length the testimony, or even such portions of it as we regard as the most significant, we may content ourselves with saying that, under the facts detailed in evidence before them, the jury were justified in holding that the appellant was a co-employee with the engineer of the wrecked train at the time the injury was received.

The road was then in course of construction at the point where the injury occurred. They both had as a common superior Mr. B. M. Temple, chief engineer, who had charge of the construction of this part of the road. The evidence clearly shows that the appellant, under his contract of service, felt himself bound, or at least consented, to perform such acts as the chief of construction or the chief's immediate subordinates desired him to do. All such acts, however, grew in a measure out of his employment, and were more or less connected with the business of the construction of the road. He had been sent once to hunt mules that belonged to the company, and, we may presume, were used in the work of construction. His chief once sent him to guard a lady passenger, put off at night at the end of the unfinished track. Other like acts are stated.

The appellant was in fact a servant of the company for hire, engaged in an employment connected with the construction of the road. His immediate business was to preserve, look after, and protect from theft or destruction the ties of appellee then being used in the construction and equipment of its roadbed; while the immediate business for the company in which he was more directly employed when injured was not connected with the preservation of the cross-ties. It was, however, closely connected with and concerned the construction of the road, and his connection with the business then on hand grew out of his contract of employment with the road. He was, at the time of the injury, engaged by the direction of his employer in carrying to the county seat of Burleson county, for record, a deed just executed to the railroad company for the land covered by the railroad station called "Lyons," by which point, and over which land, the appellee was then en-

gaged in the partially completed work of the construction of their road.

In other words, we believe the court did not err in its main charge, taken as a whole, in the third, fourth, fifth, and sixth paragraphs of it that are complained of, as to the relation in which the appellant, at the time of the injury, stood, under the evidence, to the servants of the appellee who were then engaged in running the construction train in question.

Nor do we think, under the facts and circumstances of this case, there was any error in giving to the jury the first instruction asked by appellee. It was in the main a correct statement of the law on the subject, and was applicable to the case made by the evidence.

The general rule in relation to the liability of the master for injuries by a servant to a fellow-servant may be stated thus: A master is not liable to his servant for damage resulting from the negligence of his fellow-servant in the course of their common employment, unless the servant causing the injury was incompetent to discharge his duty, or the servant injured was not at the time acting in his master's employment.

RULE AS TO LIABILITY OF MASTER FOR INJURY TO SERVANT.

A master is, however, bound to take precautions to insure his servant's safety; and if, through the absence of such reasonable precautions, or through the breach of some duty incumbent on the master, or through the personal negligence of the master, the servant is injured, the master is responsible.

The rule as laid down by our court, on the subject of co-employees and fellow-servants, will be found in *Robinson v. The H. & Tex. Cent. R. R. Co.*, 46 Tex. 550, cited by appellee in its brief. There, Judge Moore, speaking as the organ of the court, says: "It is urged that the general rule which holds that a servant cannot recover damages from the master for an injury sustained by reason of the negligence of a fellow-servant is not applicable in this case, because the injury to appellant resulted from the negligence of the conductor for the time being, to whose direction and control appellant was subjected. For a time, as says Judge Cooley (*Southern Law Review*, April, 1876, p. 110), a strong disposition was manifested in some of the courts to hold to this view. We, however, agree with him that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of another; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class."

AUTHORITIES REVIEWED.

"This, it is believed, is now recognized as the sounder and best approved rule both on reason and authority. *Priestly v. Fowler*, 3 Mees. & W. 1; *Coon v. S. & U. R. R.*, 5 N. Y. 492; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Columbus, etc., R. R. Co. v. Arnold*,

31 Ind. 174; Chicago, etc., R. R. Co. v. Murphy, 53 Ill. 336; 6 Cush. 75; 32 Vt. 473; 20 Md. 212; 23 Penn. 384."

Since the article of Judge Cooley, above referred to, was published, that learned jurist and author has devoted much time to the study of this question, and treats it quite fully in his work on Torts, published as late as the year 1880. In this work, pp. 542-545, speaking of injuries resulting from the negligence of fellow-servants, he announces his views in the following language: "The rule which exempts the master from responsibility for injuries to his servants, proceeding from risks incidental to his employment, extends to cases where the injury results from the negligence of other servants in the same employment. Whatever controversy there may have been for a time on this point may now be said, by an overwhelming weight of authority, to have been thoroughly quieted and settled. Some disputes still remain which concern the proper limits of the doctrine, and what, and how many, are the exceptional cases. In some quarters a strong disposition has been manifested to hold the rule not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another who was intrusted with the duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts and omissions on the part of one class of servants, and not those of another class. Nor on grounds of public policy could this distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who in their dealings with the employer may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not negligent himself, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of the servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant, who, being aware of the negligence, should fail to report it.

"It has also sometimes been insisted that the law should exclude from the scope of the general rule the case of a servant injured by the negligence of another, who, though employed in the same general business, and his service in some distinct branch of it; as in the case of a laborer on the track of a railroad, injured by the carelessness of an engine-driver; a carpenter employed on buildings, injured by the negligence of a yard-master in making up trains,

and the like. But in the main the authorities agree that the general rule must apply to such cases, and that, on the reasons on which the rule is rested, they cannot be distinguished from those in which the service of both persons was in the same line." Cooley on Torts, pp. 543-545.

The views expressed in the case of *Robinson v. The H. & Tex. Cent. R. R. Co.*, above quoted, are substantially the same as those deduced by Judge Cooley from a careful review of a great many authorities.

The cases of *H. & Tex. Cent. R. R. Co. v. McNamara*, 59 Tex. 255, and of *G. & S. A. R. R. Co. v. Lempe*, 59 Tex. 19; s. c., 11 Am. & Eng. R. R. Cas. 201, as also the case of *T. & P. R. R. Co. v. Kirk*, 20 Am. & Eng. R. R. Cas. 324, cited by appellant, and also the recent case of *Gulf, West. Tex. & Pac. R. R. Co. v. Montier* (Galveston term, 1884), have all been examined in connection with the present case. None of them are in the least in conflict with the views here expressed; on the contrary, some of them tend to their support. See, also, *Tex. & Mex. R. R. Co. v. Whitmore*, 58 Tex. 277; s. c., 11 Am. & Eng. R. R. Cas. 195; *Pierce on Railroads*, p. 366; *Columbus R. R. Co. v. Arnold*, 31 Ind. 174; *Manville v. Cleveland R. R. Co.*, 11 Ohio St. 417; *Farwell v. Bos. & Worcester R. R. Co.*, 4 Metc. (Mass.) 49; *Hutchinson v. Railway Co.*, 5 Exch. 343; *Morgan v. Vale of Neath R. R. Co.*, L. R., 1 Q. B. 149; *Whoolan v. M. R. & Lake E. R. R. Co.*, 8 Ohio St. 249; *Ind. R. R. Co. v. Love*, 10 Ind. 554; *Same Co. v. Klein*, 11 Ind. 38.

The judgment is affirmed.

Affirmed.

**Master not Liable to Employee for Negligence of Fellow-servant. Defect in Machinery—Notice to Employee injured.**—Where a fireman on a railroad locomotive was killed by the explosion of the boiler while the engine was standing on the track ready to start with a train of cars, and the engineer failed to come thirty minutes before the time of starting as required by a rule of the company, it was error to charge the jury that if the proof satisfied them that the engineer had failed to comply with the rule, and were further satisfied that his delay was the proximate cause of the accident, then the plaintiff would be entitled to recover. (The case of *Fox v. Sandford*, 4 Sneed (Tenn.), 36, followed and approved.)

The court say: "The mere fact that the negligent servant is, in his grade of employment, superior to the servant injured does not take the case out of the rule. Nor does the mere fact that the negligent servant is the equal or the inferior in grade of the injured servant. *Ragsdale v. Memphis, etc., R. R. Co.*, 3 Baxt. 426. They are still fellow-servants in the common service, and each must take the risk of the negligence of the other. 2 Thomp. on Neg. 1026, 1028, 1034. And it has been expressly held by other courts that an engineer and fireman who work together at or on the same engine are fellow-servants within the rule. *Jones v. Yeager*, 2 Dill. 64; *Caldwell v. Brown*, 53 Pa. St. 453. In order to charge the master, the superior servant must so far stand in the place of the master as to be charged, in the particular matter, with the performance of a duty towards the inferior servant which,

under the law, the master owes to such servant. 2 Thomp. on Neg. 1031."

Where the knowledge or the ignorance of the master and servant injured in respect to the defect in the machine are equal, so that both are either without fault or in equal fault, the servant cannot recover for injury caused by such defect. 2 Thomp. Neg. 995, 1009; East Tenn., V. & Georgia R. R. Co. v. Hodges, 2 Leg. Rep. 6; Nashville, etc., R. R. Co. v. Wheless, 10 Lea, 741; s. c., 15 Am. & Eng. R. R. Cas. 315. Nashville, etc., R. R. Co. v. Handman, Admr.,\* 18 Lea's Reports (Tenn.), 423.

**Master not Liable to Servant for Negligence of Fellow-servant.**—A switchman and a locomotive engineer are fellow-servants of the railroad company, and consequently the latter cannot recover against the company for an injury caused by the negligence of the former. Brown, Admx., v. Central Pacific R. R. Co.\* (California, June 24, 1885.), citing Farwell v. Boston, etc., R. R. Co.; 4 Metc. (Mass.) 55; Chicago, etc., R. R. Co. v. Moranda, 93 Ill. 324; s. c., 17 Am. & Eng. R. R. Cas. 564; Hogan v. Central Pac. R. R. Co., 49 Cal. 128; Collier v. Steinhart, 51 Cal. 116; McLean v. Blue Point Gravel Co., Id. 256; Wood, Mast. and Serv., § 435; Beeson v. Green Mountain G. M. Co., 57 Cal. 20; McKinne v. California S. R. R. Co., 5 Pac. Rep. 482; Yeomans v. Contra Costa Co., 44 Cal. 71; Slater v. Jewett, 85 N. Y. 62; s. c., 5 Am. & Eng. R. R. Cas. 515.

**Rock-blaster and Teamster are Fellow-servants.**—One who is engaged in hauling rock by means of a team, and those who are engaged in blasting such rock, all employed by a common master, are fellow-servants, and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employees of the defendant who were engaged in blasting rock" is a mere conclusion, and the facts will control. Bogard v. Louisville, E. & St. L. R. R. Co.,\* 100 Ind. 491.

**Baggage-master—Switchman—Co-servant.**—A baggage-master on a passenger train and a switch-tender are fellow-servants within the rule exempting the master from liability for an injury resulting to one servant from the negligence of another engaged in the common service. Roberts v. Chicago, M. & St. P. R. R. Co.,\* Minnesota, February 14, 1885. See also Collins v. St. Paul & S. C. R. R. Co., 30 Minn. 34; 8 Am. & Eng. R. R. Cas. 149; Brown v. Minneapolis & St. L. R. R. Co., 31 Minn. 553; 15 Am. & Eng. R. R. Cas. 333.

**Master and Servant—Employers' Liability Act, 1880 (43 & 44 Vict. c. 42, s. 1, sub-s. 3)**—Inquiry resulting to Workman from having conformed to Orders or Directions of Fellow-workman.—The first section of Employers' Liability Act, 1880, provides that, where personal injury is caused to a workman (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform,—where such injury resulted from his having so conformed the workman or, in case the injury results in death, his legal personal representatives, shall have the same right of compensation against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work.

The plaintiff, a boy employed by the defendants, a railway company, was assisting a carman of the defendants, under whose directions he was, in unloading from a van three large iron window frames. The frames were standing upright in the van, secured at each end to the hoops of the van by a string. The carman untied the string at one end of the frames, and the plaintiff untied the string at the other end. The carman did not expressly order the plaintiff to untie the string, but the plaintiff stated that he did so without orders because he had done so on previous occasions and that the carman saw him untie the string and made no objection. The carman then

removed one of the frames without retying the two remaining frames, leaving them standing unsecured. They directly afterwards fell on the plaintiff, causing him injuries in respect of which he sued the defendants for compensation under the Employers' Liability Act, 1880.

*Held*, that there was on the above facts evidence of an injury to the plaintiff by reason of the negligence of a fellow-workman to whose orders he was bound to conform, and did conform, and which resulted from his having so conformed. *Milward v. Midland Ry. Co.*,\* L. R. 14 Q. B. Div. 68.

**Section Hand and Engineer engaged in Wrecking are Fellow-servants. Injury on Sunday. Company not Liable.**—Rider, a section hand employed by the Houston & Texas Central R. R. Co., left the section house on a hand-car to go to a wreck. He left the hand-car at Miller's station and proceeded on a construction train to the wreck, which was cleared away by 12 o'clock on Sunday, June 12, 1880, when Rider with the other hands returned to Miller's on the construction train, intending there to take the hand-car back home. The flat car on which Rider was travelling was placed on a switch at Miller's. After this was done, the residue of the construction train, which consisted of a locomotive and tender, a caboose and one flat car, ran back towards or to the main track in order to go to Dallas in advance of the mail train, which was near and rapidly approaching. On seeing this, the engineer on the construction train, probably to avoid a collision, ran his train back on the switch, and in doing so the construction train ran against the car on which the plaintiff was, with such violence as to heavily jar it, whereby plaintiff was thrown from the car and seriously injured. The engineer was regarded as a skilful and competent engineer, but he gave no signal before running his train on the switch the second time. There was no evidence of any defect in the train. The train had an efficient crew of its own, and Rider, while upon it, owed no duty as to its management; but it was his duty to assist in clearing or repairing wrecks on his own section at all times, and on other sections whenever ordered so to do, as he was in this case. *Held*, that Rider and the persons engaged in operating the train were fellow-servants and that the company was not liable (citing *Dallas v. G. Col. & S. F. R. R. Co.*, 61 Tex. 196; *s. c.*, *infra*).

The fact that Rider "may not have been charged with a duty which rendered it incumbent on him actually to assist in the management of the train does not affect the question," said the court. "All the parties were serving the same master, working under the same control, derived their authority and compensation from the same common source, and were engaged in the same general business, though it may have been in different grades or departments of the same common service. This made them fellow-servants, and the court, in a general way, so charged."

*Held*, also, that there was no evidence that Rider was engaged in his own private business at the time of the injury, and the court should not have charged that if Rider was so engaged when injured the company was liable.

*Held*, further, that the fact that the work and injury were on Sunday did not change the relation of the employees as fellow-servants. *Houston, etc., R. R. Co. v. Rider*,\* 62 Tex. 267.

## UNION PACIFIC R. R. Co.

v.

HARRIS.

*(Advance Case, Kansas. April 10, 1885.)*

A section-man, employed by a railway company to repair its roadbed and to take up old rails out of its track and put in new ones, who is injured, without his fault, by the negligence of his co-employees in permitting an iron rail, intended to be placed on the track, to fall upon him while he is assisting in removing the rail from a push car on the track, is within the terms of section 1, c. 94, Sess. Laws 1874 (section 4914, c. 84, Comp. Laws 1879) of Kansas.

## ERROR from Leavenworth county.

Action by Harris against the Union Pacific R. R. Co. to recover for a personal injury, brought July 29, 1883. The petition, omitting court and title, was as follows:

"The plaintiff, a citizen of Kansas, complains of the defendant, and avers that the defendant is a corporation, existing under and by virtue of law, and plaintiff avers that the said Union Pacific R. R. Co., Kansas Division, owns and operates a railway, cars, locomotives, and engines over its road, through the county of Leavenworth, State of Kansas, and is doing business in said county and State; that on and before the thirtieth day of March, A.D. 1883, the plaintiff was in the employ of the defendant, and about its business, in repairing the said railway track of said defendant, at or near Fall Leaf, in said county of Leavenworth, and in said State of Kansas; that on said thirtieth day of March, A.D. 1883, the said defendant had in its employ, in and about said business, at said place, some five or six men besides the said plaintiff, engaged in the said common employment of fixing and repairing the railway track of defendant at such point, on said day; that part of the work which said plaintiff and his co-employees were engaged in at said point, on said day, was in removing rails, replacing rails on and along the ties upon the roadbed of defendant at such place, and in loading and unloading heavy iron rails to be replaced along the ties upon said track; that while engaged in such business, and without fault upon his part, and through the negligence and mismanagement of the defendant, its agents, servants, and his co-employees, a heavy iron rail was carelessly and negligently unloaded, and thrown down, and by means thereof the right foot of the plaintiff was greatly injured, and his toes crushed and torn off, and the plaintiff jerked down, and twisted so that he was unable to work; by reason thereof he has become permanently injured and disfigured for life; that he was thrown out of employment, and is



still unable to work; that he has suffered great pain of body and mind, and has been put to great expense in and about trying to be healed and cured of such great injury, all to his damage in the sum of five thousand dollars. Wherefore, plaintiff prays and demands judgment against the said defendant, for and on account of the injuries so received by him, as aforesaid, in the sum of five thousand dollars and costs of suit."

On August 20, 1883, the railway company filed its petition for removal of the action to the circuit court of the United States for the district of Kansas. On September 13, 1883, the district court held the bond for removal sufficient in form and amount, and the sureties thereto were approved, but refused to make an order of removal. Trial had at the September term for 1883 before the court with a jury. The jury found for plaintiff, and assessed his damages at the sum of \$2500. The following questions of fact were submitted to the jury on request of plaintiff, and the jury returned in writing their answers as follows:

"*Question 1.* Did the plaintiff's co-employees negligently permit the iron rail to fall, by means whereof the plaintiff was injured? *Answer.* Yes. *Q. 2.* Was the plaintiff guilty of any negligence contributing to his injury? *A.* No."

And to the following questions of fact submitted to the jury on request of defendant, the jury return answer in writing as follows, to wit:

"*Question 1.* Was the injury to plaintiff, by him complained of, caused solely by the act of his co-employees Crothers and Wetzel in removing a rail from a push car to the ground? *Answer.* Yes. *Q. 2.* Were not the plaintiff and his co-employees, at the time of the accident and injury sustained by him, section-men upon the railroad of the defendant, in the service of the defendant; and was it not their duty to repair the track; and, in keeping the track in repair, was it not part of their duty to take old rails out of the track and put in new ones? *A.* Yes. *Q. 3.* Were not the plaintiff and his co-employees engaged in the service necessary to accomplish the taking out old rails and putting in new at the time he was injured? *A.* Yes. *Q. 4.* Were not Mateman, Crothers, and Wetzel co-employees of the plaintiff at the time of the injury and in handling the rail in question, and were they not all engaged in the same labor? *A.* Yes. *Q. 5.* Was not the accident and injury to plaintiff caused solely by Crothers and Wetzel letting their end of the rail fall before word was given to heave the rail? *A.* Yes. *Q. 6.* In handling rails as the one in question was handled, was it the practice for all parties to hold onto the rail till one of the parties should give the word to heave the rail? *A.* Yes. *Q. 7.* Did not the rail leave the hold of Crothers and Wetzel before any word was given to heave the rail? *A.* Yes. *Q. 8.* Do the jury find from the evidence whether Crothers and Wetzel purposely

heaved or let go the rail, or whether it fell from their hands accidentally; and if they did so, state which? *A.* Neither purposely nor accidentally. *Q.* 9. Does the evidence show that it was any part of the duty of plaintiff to ride upon the cars of defendant? *A.* No."

On September 18, 1883, the railway company filed its motion asking the court to render judgment in its favor upon the special questions and answers returned by the jury, notwithstanding the general verdict. On October 6, 1883, the court overruled this motion, and rendered judgment, in accordance with the general verdict, for the sum of \$2500, together with all costs. The railway company excepted, and brings the case here.

*J. P. Usher* and *Charles Monroe* for plaintiff in error.

*Lucien Baker* for defendant in error.

HORTON, C. J.—The petition in this case alleged that the plaintiff at the time of the injury complained of was in the employ of the railway company, and about its business, in repairing its track in Leavenworth county, in this State. The special findings also show that the plaintiff and his co-employees were section-men, engaged at work upon the railway of defendant, as alleged in the petition; that it was their duty, in repairing the track, to take the old rails out of the track and put in new ones; that the plaintiff was injured by the negligence of his co-employees in removing an iron rail from a push car to the ground; that his co-employees negligently permitted the rail to fall upon his right foot; that, in handling the rails for the purpose of repairing the track, it was the practice for all parties handling the same to hold onto the rail until one of the parties gave the word to throw the rail; that the rail left the hold of two of the employees handling the same with the plaintiff before any word was given to throw the same.

To the following question, "Does the evidence show that it was any part of the duty of plaintiff to ride upon the cars of defendant?" the jury, in their special findings of fact, answered, "No." At the common law it is well settled that the railway company would not be liable to the plaintiff for the damages sustained by him under the findings of fact. The rule of the common law, however, has been changed in this State by the statute of 1874, § 1, c. 94. This statute reads:

"Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage."

The question, therefore, arises whether under the statute of 1874 the plaintiff was entitled to recover for the personal injuries inflicted upon him through the negligence of his co-employees. The con-

STATUTORY AND  
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RULE AS TO IN-  
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SERVANTS.

tention on the part of the railway company is that the employee, in order to recover under the statute, must have received his injury through the negligence of a co-employee while they, or either of them, were in the use and operation of the railway; and it is the further contention that the findings in this case do not establish that either the injured employee or the negligent ones were engaged in the use and operation of the railway. As conclusive, counsel cites *Smith v. Railway Co.*, 59 Iowa, 73; *Malone v. Railway Co.*, 61 Iowa, 326; s. c., 11 Am. & Eng. R. R. Cas. 165. This State adopted the statute of 1862 of Iowa. The statute of that State, however, was changed in 1872 so as to allow employes of railway companies to recover against the companies for injuries received from the negligence of co-employees only "when such wilful wrongs are in any manner connected with the use and operation of the railroad so owned and operated, or on or about which they shall be employed." The Code of Iowa for 1873, now in force, slightly changed the statute of 1872, but embraces the words "when such wrongs are in any manner connected with the use and operation of any railway." Code Iowa 1873, § 1307, p. 239. The decisions of the supreme court of Iowa construing the statute of 1872 and 1873 are therefore not strictly applicable to the case at bar. This is clearly apparent from a comparison of the statutes of Iowa of 1862 with the statutes of 1872 and 1873, and also from a late decision of the supreme court of that State.

In *Molone v. Railway Co.*, 17 Am. & Eng. R. R. Cas. 644, Mr. Justice REED, after referring to the Iowa statute of 1862, speaking for the court, said:

"But the subsequent legislation has established a new rule as to the class of acts for which the companies are liable, so that to entitle an employee now to recover against the company for injuries which he has sustained in consequence of the negligence, mismanagement, or wilfulness of a co-employee, he must show, first, that he belonged to the class of employees to whom the statute affords a remedy; and, second, that the act which occasioned the injury was of the class of acts for which a remedy is given." 19 Reporter (Feb. 25, 1885), 238; s. c., 21 N. W. Rep. 756.

While the statute of 1862 of Iowa was in force, the supreme court of that State decided that, as the statute applied to all railroad corporations then in existence, or which might hereafter exist, therefore, the law was general, and of uniform operation throughout the State. *McAunich v. Railroad Co.*, 20 Iowa, 338. The limitation placed upon the statute by that decision was as follows: "If there is an employer and employee, but no business of a railroad company to be engaged in, then the case is not within the act." *Railway Co. v. Haley*, 25 Kan. 35. With this construction and limitation of the statute we fully concur.

We are, however, referred to *Deppe v. Railway Co.*, 36 Iowa,

52, as limiting the statute of 1862 to employees engaged in the business of operating a railway. In that case the employee was injured by the falling of an impending bank while shovelling dirt. The employee was held to be within the protection of the statute, yet he was not injured while riding on a passenger train, freight train, or hand-car, or while moving the same, by the negligence of a co-employee operating or moving such car; nor did he receive his injury "through the negligence of a co-employee while they, or either of them, were in the actual operation of the cars or trains of the railway." It is true that the connection of the injured employee with the dirt train was stated as the ground for the affirmance of the judgment, but beyond the conclusion that the employee in that case was within the terms of the statute, much of the language of the opinion seems to be *obiter*, therefore not authority; other portions evidently are based upon provisions in the Iowa constitution not embraced in the constitution of this State. See, also, *Ditherner v. Railway Co.*, 47 Wis. 138, where a section hand employed by the railway company was held to be entitled to recover for personal injuries, under the statute of that State making railway companies liable for injuries to employees from the negligence of co-employees.

In the case before us, at the time of the injury complained of, plaintiff below was in the employ of the railway company, and was actually engaged in the business of the company upon its roadbed and track in the work of replacing old rails of the track with new ones, and, while assisting in removing a rail from a push car upon the track, he was injured, without fault on his part, by the negligence of his co-employees. With our construction of the statute, there is nothing in the petition or findings of fact to prevent his recovery.

Finally, our attention is called to the finding of the jury that the iron rail which fell upon the plaintiff was not thrown purposely or accidentally, and, therefore, it is insisted, there was no culpable negligence upon the part of the co-employees. The findings show that the dropping of the rail by the co-employees was not done intentionally or by mere accident. It follows, therefore, under the general verdict, that the co-employees were guilty of negligence in letting the rail fall.

The ruling of the district court, in refusing to order a removal of the case to the Federal court, was properly denied. *Railway Co. v. Dyche*, 31 Kan. 120; s. c., 14 Am. & Eng. R. R. Cas. 272.

The judgment of the district court will be affirmed.

**Track-repairer injured by Iron Rail falling upon his Finger.**—Shackelford was in the employment of the railway company as a laborer upon a construction train. At the time the injury was received, for which he sued, he was specially engaged in moving heavy iron rails from one flat car to another. While he and his co-laborers had a bar of iron in their hands, and were in the act of shifting it from one car to another, the train was put in motion

without warning of any kind. This caused the men to drop the iron, which, rolling over and catching the thumb of plaintiff's right hand, crushed it. The answer denied that the injury was the result of the defendant's negligence. A jury trial resulted in a verdict of \$1250 damages for the plaintiff. *Held*, that the injury was caused by the negligence of fellow-servants and the company was not liable. *St. Louis, I. M. & S. R. R. Co. v. Shackelford*, \*42 Ark. 417. See also *Cooley on Torts*, 542, and cases cited; *Wood on Master and Servant*, sec. 428; *Bartonhill Coal Co. v. Ried*, 3 Macq. 266; *Farwell v. B. & W. R. R. Corp.*, 4 Met. 49.

In the case last cited, a locomotive engineer was injured through the carelessness of a switchman.

In *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419, a brakeman sustained injury by reason of the making-up of the train of cars with platforms of unequal height by the ordinary servants of the company.

In *Rohback v. Pacific R. R. Co.*, 43 Mo. 187, a trackman was injured through the carelessness of an engineer in backing a train of cars, without ringing the bell or sounding the whistle, on to the plaintiff, who was at work with his face from the train. And in all these cases it was decided that the master could not be held to respond in damages, the difference in the grade of the servants being of no consequence, so long as both serve and are paid by the same master, work under the same control, and are engaged in the same general business.

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## YOULL

v.

### ST. LOUIS AND PACIFIC R. R. CO.

(*Advanced Case, Iowa. June 5, 1885.*)

The mere fact that a brakeman injured was a minor, will not entitle him to recover for such injury, if he was physically able to perform the duties he was employed to do, and, in the absence of evidence to the contrary, it will be presumed that he was of ordinary intelligence.

The plaintiff, a brakeman in the employ of a railroad company, was, in pursuance of his duties, standing on top of certain freight cars while a flying switch was being made. Sometimes the brakeman uncoupling the cars gave the signal to the engineer to go ahead when the uncoupling was effected, and sometimes the brakeman was in the position of plaintiff. In the present case, the former gave the signal and the plaintiff was knocked off the train by the sudden start and injured.

*Held*, that he was not entitled to damages.

It was immaterial in the above case that a rule of the company required its servants to exercise care when making flying switches, and to avoid them even if it increased the work.

### APPEAL from Cherokee circuit court.

The petition states that the "plaintiff was employed by the defendant as a brakeman, . . . he being a minor, young and inexperienced in the dangers incident to the operation of railroad trains, and being only 17 years of age," and while in such employ-

ment as brakeman on a freight train he was ordered by the conductor, . . . whose orders defendant required him to obey, "to assist in making a flying switch and to watch the uncoupling of the cars while he was on the top of the train, and to stand on the rear end of the car, the last one forward of the cars to be cut off and uncoupled, and signal the engineer when the car on which he stood was uncoupled from the ones in the rear. While so standing another employee, knowing the danger of the plaintiff, signaled the engineer, or the engineer, on his own motion, suddenly gave the engine steam, and jerked the train (without waiting for the signal of the plaintiff, or giving him time or opportunity to secure or protect himself) with great force and violence, so that the plaintiff was thrown from the car" and injured. . . . And plaintiff further "alleges that the conductor was grossly negligent in ordering said running switch in violation of the rules of the defendant; that the defendant, by its engineer and other brakeman, was negligent in not receiving the signal from him, and in the other brakeman giving the signal when the plaintiff was in danger, and in putting on an unnecessary amount of steam and switching the train, all of which was negligence; that defendant was negligent in placing the plaintiff in so dangerous a position, and in employing him, in view of his age." At the conclusion of the plaintiff's evidence the court, on motion, directed the jury to find for the defendant, which was done, and plaintiff appeals.

*Brown & Carney* for appellants.

*Joy, Wright & Hudson* for appellees.

SEEVERS, J.—1. When the motion was filed asking the court to ADMISSION. direct the jury to find for the defendant, the plaintiff asked that the defendant be required by the court to admit of record all the facts that the evidence tended to prove. This was denied by the court, and it is said that in so doing the court erred to the prejudice of the plaintiff. This question was considered and determined in *Stone v. Chicago & N. W. R. R. Co.*, 47 Iowa, 90. See, also, *Starry v. Dubuque & S. W. R. R. Co.*, 51 Iowa, 422; *Bothwell v. Chicago, M. & St. P. R. R. Co.*, 59 Iowa, 192; s. c., 7 Am. & Eng. R. R. Cas. 570; *Gilman v. Sioux City & P. R. R. Co.*, 62 Iowa, 299; s. c., 13 Am. & Eng. R. R. Cas. 538.

2. It is not claimed by counsel in argument that there is any evidence tending to show that the engineer or conductor was in any respect negligent. But it is insisted that the defendant was negligent in employing the plaintiff, and requiring him to perform (because of his age and inexperience) the duty in performance of which he was injured. There is no evidence tending to show that

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MINOR.

defendant had knowledge of the plaintiff's age, nor is there any evidence which tends to show that because of his appearance the defendant was put on inquiry as to his age. He

was 17 years and 2 months old at the time of his employment, and he was injured 7 months thereafter. For aught that appears the plaintiff had the stature and appearance of an adult. If this was not so, we think the plaintiff should have established such fact.

The mere fact that the plaintiff was a minor will not authorize him to recover if he was competent and physically able to perform the duties he was employed to do. *Curran v. Merchants' Manuf'g Co.*, 130 Mass. 374; *Houston & G. N. R. R. Co. v. Miller*, 51 Tex. 270. If the plaintiff had been of such tender years as to be unable, because of immature judgment or bodily strength, to perform the duties incumbent on him by reason of his employment, or was wholly inexperienced in the business in which he was engaged, then it may be the defendant should be deemed negligent in placing him in a dangerous position. *Combs v. New Bedford Cordage Co.*, 102 Mass. 574. There is no evidence which tends to show that the plaintiff was inexperienced in the duties of brakeman at the time he was injured. He does not so claim in his testimony; on the contrary, it clearly appears that he had the requisite experience. The defendant cannot, therefore, be regarded as negligent because it employed the plaintiff as a brakeman and required him to perform the usual duties with which he was charged by reason of such employment. It must be presumed, in the absence of evidence to the contrary, that the plaintiff was a person of average intelligence; and he does not claim he was required to do work he did not comprehend, or that he was not aware of all the ordinary dangers incident thereto. The foregoing views are in accord with and supported by *McGiannis v. Canada Southern Bridge Co.*, 49 Mich. 466; s. c., 8 Am. & Eng. R. R. Cas. 135.

3. Was the defendant or its employees negligent in the way the flying switch was made? In the discussion of this question we desire again to say that it is not claimed that the engineer was negligent in increasing the speed of the train at the time and in the manner he did. It will be conceded that the conductor required the plaintiff to assist in making the flying switch, and that he was required to obey such order. But the conductor did not require, nor did the plaintiff assume, any unusual place or undertake to perform any extraordinary duty. There were three brakemen on the train, the plaintiff being designated as the middle brakeman. As the train moved towards the switch the plaintiff walked along with the conductor until the third car of the train reached him, and then he got on such car. He ran and walked on top of the cars until he reached the end of the car next the one to be cut off, and it was from this car he fell. While the plaintiff was passing along the top of the cars, and about the time, or just prior to the time, he reached the end of the car, the rear brakeman pulled the pin and signaled the engineer to go ahead. Thus far there was no negligence in any one, unless the brakeman

who pulled the pin was required to give the signal to the plaintiff so that he could communicate it to the engineer, and as he thus would obtain knowledge of the movements of the train, he could protect himself from the ordinary and usual "jerk" which always follows the taking up of the "slack."

The evidence, without contradiction, shows that sometimes the signal was given to the engineer by the brakeman who pulled the pin, and at others it was given to a brakeman on the cars, and by him communicated to the engineer. There is no evidence which tends to show negligence on the part of the brakeman who pulled the pin. The plaintiff knew when he got on the train that the signal might be given to him, or direct to the engineer. The plaintiff cannot, under the undisputed evidence in this case, require that the signal should be given in any particular manner. As to whether he might or might not be injured if it was given in any particular manner, was one of the ordinary hazards which the plaintiff assumed.

4. Counsel claim that there is a rule of the company which forbids flying switches; or that if this is not so, then the company was negligent in not having such a rule and enforcing it. The rule is as follows: "(45) *Flying Switches*.—Coach switching conductors must see that brakemen, with good and sufficient brakes, are on any moving cars; and they are cautioned as to making flying switches (switch rope being furnished). Avoid such switching, even if it increases your work." This rule is advisory only, and imposes caution on the employees when making such switches, but clearly does not forbid them.

The superintendent of the defendant had personal knowledge of at least one flying switch being made, and made no objection thereto. Is a railroad company guilty of negligence if it allows such switches to be made? It is unnecessary to determine this question; but see *Jeffrey v. Keokuk & D. M. R. R. Co.*, 51 Iowa, 439. No adjudicated case has been brought to our attention which so holds. But be this as it may, such switches were frequently made by the employees on defendant's road, and the plaintiff participated and aided therein without objection; and on this occasion he made no objection whatever to their performance of the duty incumbent on him. The defendant cannot be held liable for an accident which occurred under such circumstances. *Kroy v. Chicago, R. I. & P. R. R. Co.*, 32 Iowa, 361; *Way v. Illinois Cent. R. R. Co.*, 40 Iowa, 343; *Lake Shore & Mich. S. R. R. Co. v. Knittel*, 33 Ohio St. 468; *Ladd v. New Bedford R. R. Co.* 119 Mass. 412.

Affirmed.

PECK, C. J., and ADAMS, J., dissenting.

**Employment of Minor as Brakeman. Injury. Recovery by Parent.**—The fact that a minor was employed as a brakeman by a railway company without the consent of his parent will not of itself authorize a recovery for damages



resulting from injuries inflicted by the company in the course of his employment. A minor may make a contract which will create between himself and his employer the relation of master and servant, with the rights, duties, and liabilities which attach to that relation. *Texas and N. O. R. R. Co. v. Crowder*, \* 61 Tex. 262. See *T. & P. R. R. Co. v. Carlton*, 15 Am. & Eng. R. R. Cas. 350.

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BRYANT, Adm'r,

v.

BURLINGTON, CEDAR RAPIDS AND NORTHERN R. R. Co.

(*Advance Case, Iowa. June 4, 1885.*)

When an employee undertakes any duty that requires him to engage in "bucking snow," he assumes the usual and ordinary hazards of such occupation; and if the effort to remove the snow by that method is made in the manner in common use, he has no right to complain if an accident occurs.

On examination of the evidence in this case, *held*, that negligence on the part of the company is not shown, and that the court properly directed the jury to find for defendant.

APPEAL from Linn circuit court.

The petition states that Albert Bryant, deceased, was an employee of the defendant, and that the engine on which he was fireman was thrown from the track with great violence, without negligence on the part of the deceased, whereby he was instantly killed. It is stated that the accident occurred because the defendant was negligent in failing to keep the track free from snow and ice; that defendant, knowing its track was so incumbered, ran its train at a high rate of speed, well knowing that under such circumstances they were liable to leave the track; that the train on which the deceased was performing the duties as fireman was not provided with a snow-plough, and that there were two engines attached thereto; that the train was run into a large bank of compact snow and ice. The defendant denied that the accident was caused by the negligence of the defendant, and it pleaded that the accident occurred when the train and employees were engaged in "bucking snow," which was one of the usual and ordinary hazards the deceased assumed when he undertook the duties of fireman. There was a trial by jury, and at the conclusion of the plaintiff's evidence the court, on motion, directed the jury to find for the defendant, which, being done, judgment was rendered on the verdict, and the plaintiff appeals.

*Stoneman, Rickel & Eastman* for appellant.

*S. K. Tracy and W. G. Thompson* for appellee.

21 A. & E. R. Cas.—88

SEEVERS, J.—The evidence tended to show that during two days previous to the accident there prevailed an unusual snow-storm, accompanied by a severe wind, and it was very cold. No train had passed over the road for 24 hours because of the cold weather and snow-drifts. On the day of the accident the train in question arrived at Traer from the north. It was a passenger train pulled by two engines, and to the forward engine a snow-plough was attached. The plough was left at Traer, and the train, drawn by two engines, proceeded south, and about five miles from Traer the accident occurred. The pilot on the forward engine had the spaces therein filled with strips of wood. A gang of shovellers started from Traer before the train, with orders to clear the track. They arrived at the place of the accident a short time prior to the train. The track was in good condition but for the snow-drifts, and the train was in all respects properly equipped except that there was no snow-plough, and it was drawn by two engines. At the place of the accident there was a snow-drift which possibly was two feet deep on one rail, and six inches on the other. It was packed so hard by the force of the wind that it bore the weight of a man. Intermingled with it were dirt and gravel. The drift could be seen by the employees on the train as they approached it for a mile at least. The train was run into the drift at a faster speed than trains were ordinarily run on the road, but there is no evidence tending to show that such rate of speed was greater than ordinarily when "bucking snow." Both engines left the track because the snow was so compact that probably the forward one "lifted;" that is, was raised above the track by the snow. There can be no doubt under the evidence that the engines left the track because of the snow, and any other finding should have been promptly set aside because unsupported by the evidence. Such being the material, and we may say undisputed, facts, did the court err in directing the jury to find for the defendant; or in other words, is there any evidence of negligence?

1. In this latitude storms of more or less severity like the one in question frequently occur. It is a duty railroad companies owe to the public to remove snow from the track and operate the road as soon as it can be done, by exercise of great diligence and the use of all the means and appliances at their command. The company has the undoubted right to adopt such methods for that purpose as its best judgment may dictate. It may be that it would not have the right to adopt doubtful experiments; experience has undoubtedly demonstrated in what manner the required duty can be best performed. Such methods, it must be assumed, are known to the companies and its employees. The latter, therefore, when they undertake the performance of any duty which requires them to engage in "bucking snow," assume the usual and ordinary hazards of their occupation; and if the effort to

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remove the snow by that method is made in the manner in common use, they have no right to complain if an accident occurs. *Morse v. Minneapolis & St. L. R. R. Co.*, 30 Minn. 465; s. c., 11 Am. & Eng. R. R. Cas. 168; *Naylor v. Chicago & N. W. R. R. Co.*, 53 Wis. 661; s. c., 5 Am. & Eng. R. R. Cas. 460, and authorities cited; *Howland v. Milwaukee, L. S. & W. R. R. Co.*, 54 Wis. 226; s. c., 5 Am. & Eng. R. R. Cas. 568.

2. The material question, therefore, is whether there is any evidence of negligence in this case. The burden to establish it was on the plaintiff. There is no evidence which tends to show that the train in question was not equipped in the ordinary manner. It seems to be assumed by counsel for the appellant that it was negligence to start the train without a snow-plough and with two engines; but this cannot be so unless this was an unusual mode, and there is no evidence which so tends. On the contrary, we are impressed that the mode adopted on this occasion is usual and ordinary on all well-conducted roads in this latitude. The defendant would not be justified in relying on shovellers to remove such obstruction, and yet it did what it could in this direction. Snow can only be expeditiously removed by the use of trains, and, as we can readily see, when so engaged the train must be run at such speed as will overcome the resistance of the snow-drift. There is no evidence which tends to show that the speed of the train in question was greater than it should have been for the purpose of accomplishing the passage of the train. It is true, the engineer on the forward engine saw this drift; and, as there is no evidence to the contrary, it must be assumed that he was a careful and competent engineer. He undoubtedly knew there was some danger incurred in running his engine and train into the drift. This danger he shared with other employees; and it must be presumed that he would not have done so if he thought he incurred danger of bodily harm. The evidence does not show that the drift in question was unusual. There was not, therefore, anything to warn the engineer that the hazard was greater than is ordinarily incurred by train employees when engaged in "bucking snow."

3. One Wilson was foreman of the gang of shovellers, and his deposition had been taken by appellant; but, as he was present in court, the defendant objected to the reading of the deposition. He was thereupon examined orally. After the plaintiff had closed his evidence, and the defendant had moved the court to direct the jury to find a verdict for it, the plaintiff asked and obtained leave to file an amendment to his petition, stating that it was Wilson's duty to inspect the track, and keep it free from snow and ice at the place where the accident occurred, and that he had knowledge of the snow-drift, its extent and compactness, and that he failed and neglected to warn the employees on the train that it was dangerous to

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run the train into it, and that Wilson knew of the approach of the train a sufficient length of time to permit him to do so.

Counsel for the plaintiff stated they desired to examine Wilson as a witness, but he had left the court-room, although they had requested him to remain; and thereupon they asked leave to read his deposition in evidence. To this the defendant objected on the ground that there was a new issue, and they desired to and had had no opportunity to cross-examine Wilson as to such issue. The objection was sustained, and this ruling is undoubtedly correct. Wilson did not signal the train, and, clearly, it was not his duty to do so unless he had examined the drift, and, as a reasonable and judicious man, reached the conclusion that the attempt should not be made to run through it.

The record before us fails to show that Wilson had examined the drift, nor is there evidence which tends to show that it was not of the usual and ordinary character in every respect. We therefore are of the opinion that the judgment of the circuit court must be affirmed.

BECK, C. J., dissenting.—1. The only questions to be considered in this case involved the correctness of the ruling of the district court in directing the jury to return a verdict for defendant. Conclusions upon these questions are decisive of the case. The ruling was based upon the ground that the evidence failed to show a state of facts upon which the law would authorize a recovery by plaintiff. The evidence tends to prove the following facts: The intestate **FACTS.** was employed in the capacity of a fireman upon an engine attached to a passenger train upon defendant's road running southward from Iowa Falls, on the eleventh day of January, 1883. An unusual storm, accompanied by snow, had prevailed to such an extent as to interrupt the running of trains for nearly 30 hours prior to the accident. The train was drawn by two engines, the one forward having attached a snow-plough, until Traer was reached, when the engine with the snow-plough was detached, and another, without a plough, was attached in its place. The train then proceeded southward about 5 o'clock in the afternoon. A "gang" of section-men, under proper directions, had proceeded in the morning southward from Traer, removing the snow-drifts from the "cuts" and other places where it was thought proper. They had in this manner cleared the track for a distance not shown, further than it was less than five and a half miles; and when the train approached they were about to remove a drift of snow near the crossing of a highway, which the foreman had inspected and determined to remove. The snow at this point was from 20 inches to 2 feet deep, mixed with the earth borne by the wind, and was found to be so compact as to be of sufficient strength to support the men who walked upon it, and they found it necessary to bear upon their

shovels in order to force their tools into the snow. The drift was in plain view from the engine for the distance of one mile, the track being straight and level, and the foreman of the section-men plainly saw the approaching train the whole of that distance. No signals were given indicating the condition of the track. The train approached at an unusual speed, and struck the snow-drift at the speed of 20 or 25 miles per hour. Both engines were thrown from the track. The forward engine was turned over into the ditch of the road, and its position nearly reversed. The intestate was upon this engine, and was instantly killed.

The district court held that upon these facts plaintiff was not entitled to recover. The grounds of this ruling are not disclosed by the record, but counsel for defendant endeavor to support it by maintaining the following positions: "(1) If the accident was caused by the snow, then the misfortune resulted from one of the hazards naturally incident to decedent's occupation. (2) If it was caused by the absence of a snow-plough, then he waived a recovery upon that ground, because he made no objection to not having one attached. (3) There is no evidence whatever in all the case to show what caused the accident, and therefore no negligence is established against the defendant. (4) No legal damage was proved."

2. It must be observed that the cause of the accident was a question of fact for the determination of the jury, and it was not competent for the court to determine, as a question of law, that the accident resulted from one cause or the other. If it should be found that the cause of the accident was the attempt of the engineer in charge of the train to force the passage through the drift by running his train against it with sufficient speed to throw the snow from the track, which, in the language of railroad men, is called "bucking snow," it may, for the purpose of the case, without so holding, be assumed that the intestate assumed the hazard thereof by entering and remaining in defendant's employment. But it cannot be claimed that intestate assumed the hazards of "bucking snow," when, in the exercise of proper care, it should not be attempted. Nor can it be claimed that every attempt to "buck snow" is made in the exercise of proper care. It cannot be doubted that attempts to clear the track in that way may be made in a manner and under circumstances which would amount to negligence, and render the party authorizing and directing it liable for injuries resulting therefrom. It follows that the question of defendant's negligence is presented in the case, even if it be conceded that the intestate assumed the hazard of "bucking snow." This question was not for the determination of the court as a question of law, but was for the jury. In this view of the case this district court erred in directing a verdict for defendant. *Morse v. Minneapolis & St. L. R. R. Co.*, 30

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WHEN NEGLIGENCE  
IS FOR JURY.

Minn. 465; s. c., 11 Am. & Eng. R. R. Cas. 168; and other cases of like effect,—holding that an employee upon a train which is used in “bucking snow” assumes the hazard of the work,—are not in conflict with the foregoing views. These decisions contemplate cases in which the “bucking” is done under proper circumstances and with proper care. It is not held therein that “bucking,” under circumstances showing negligence, may be done and the employee be charged with all its risks and hazards.

3. If it should be found that the accident was caused by the absence of a snow-plough, and it be conceded for the purpose of the case, without so deciding, that failure to object to running the train without a snow-plough would waive the consequence of defendant's negligence, it should be made to appear, in order to support the waiver, that intestate knew an attempt would be made to “buck snow,” and that he was expected to engage in that service. There is no evidence tending to show that he possessed such knowledge. On the contrary, he was authorized to believe that the track south of Traer was clear of snow. The facts that the snow-plough was left at that place, and a gang of men was engaged in clearing the track, was sufficient to authorize the conclusion that snow-drifts would not be found which would require “bucking.” Other grounds for such belief could be stated. Whether the facts authorized the conclusion that intestate waived the negligence of defendant in not providing a snow-plough south of Traer was a matter for the jury.

4. We think there was evidence, tending to establish the negligence of defendant, which should have been submitted to the jury upon the issues in the case. This evidence relates to the speed of the train when it approaches the snow-drift, showing a purpose to “buck” it, the character of the drift, the opportunity possessed by the engineer in charge of the train to determine whether it could be safely “bucked,” the knowledge which the foreman of the section men had of the drift, and his failure to signal the approaching train of the danger. These, and other facts which need not be stated, were proper to be considered in order to determine the question of defendant's negligence. It cannot be said that there was such an absence of evidence of defendant's negligence as authorized the court to take the case from the jury.

5. It is lastly insisted that no damage resulting from the loss of intestate's life was proved. In the case of death produced by a wrongful act, the statute secures a remedy in favor of the estate of the deceased. Code, § 2526. The wrongful act and the consequent death being shown, the law, under familiar rules, will, without other proof, allow at least nominal damages; and under the statute thus cited, “the damages are to be disposed of as personal property belonging to the estate.” The administrator may re

cover the damages, and their appropriation will be directed by the law.

I reach the conclusion that the district court erred in directing a verdict for defendant, and that the cause ought to be remanded for a new trial.

REED, J., concurs in this dissent.

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COOLBROTH

v.

MAINE CENTRAL R. R. Co.

(*Advance Case, Maine. March 7, 1885.*)

When a servant of mature age and common intelligence engages to serve a master, he undertakes, as between himself and master, to run all the ordinary and apparent risks of the service. This principle applied in the case of a servant of a railroad company, employed to throw mail-bags into moving trains, who was injured while so doing.

*S. C. Strout, H. W. Gage & F. S. Strout and N. & H. B. Cleaves* for plaintiff.

*Drummond & Drummond* for defendant.

LIBBEY, J.—It is the well-settled law that a servant of mature age and common intelligence, when he engages to serve a master, undertakes, as between himself and master, to run all the ordinary and apparent risks of the service. This rule is so well and uniformly settled that no citation of authorities is needed.

There are exceptions to this general rule, but the facts averred in the plaintiff's declaration do not take the case out of it. The allegations are, in substance, that on the 15th day of October, 1879, he was, and for a long time prior thereto had been, in the employment of the defendants, and for three weeks prior thereto had been stationed at the transfer station near Portland, and required to throw into the train of the defendants, going east by said station, mail-bags while the train was in motion, "which service, as was well known to the defendants and not well known to the plaintiff, was a dangerous service;" and on said fifteenth day of October, while in the performance of that service, in carefully attempting to throw the mail-bags into the mail-car while the train was in motion passing said station, he was thrown down under the train and was injured.

Here are no allegations of any unusual or extraordinary occur-

rences on that occasion, or of any unusual danger that caused the plaintiff to fall, but, at best for him, his fall and injury were caused by the ordinary and apparent dangers of the service, apparent to any man of ordinary capacity for such service. True, it is alleged that the service, "as was well known to the defendants and not well known to the plaintiff, was a dangerous service;" but it is not alleged that the defendants did not inform the plaintiff that the service was dangerous. Such an allegation is necessary to show the defendants in fault. The fact cannot be implied from the allegation that the dangers were not well known to the plaintiff. But we feel clear that in this case such an allegation would not help the plaintiff. The dangers were as apparent to the plaintiff as to the defendants. If the plaintiff did not understand them when he commenced the service, he had been performing it for three weeks, with all the dangers apparent every time he threw the bags into the car, without protest or complaint; and, by so doing, must be held to have taken upon himself the hazard which caused his injury. *Shanny v. And. Mills*, 66 Me. 420; *Yeaton v. Boston & L. R. Co.*, 135 Mass. 418; s. c., 15 Am. & Eng. R. R. Cas. 253; *Hathaway v. Mich. Cent. R. Co.*, 51 Mich. 253; s. c., 12 Am. & Eng. R. R. Cas. 249; *Thompson on Neg.* 976, § 7.

Exceptions sustained. Demurrer sustained. Declaration bad.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

**Injury by Sleeping-car Porter throwing off Bundle of his Soiled Clothes—Company not Liable.**—A different conclusion from that in the principal case was reached in Massachusetts in *Walton v. New York Cent. S. C. Co.*\* (Massachusetts, June 24, 1885), wherein a porter in a drawing-room car threw from the train a bundle of soiled clothing belonging to himself which struck and injured the plaintiff. In a suit against the car company to recover damages, *held*, that as it did not appear that the porter was acting within the scope of his duty in throwing such a bundle, the company was not liable.

W. ALLEN, J., said: "The ruling and instructions of the court were correct. There was no evidence that Maxwell was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment; and it is wholly immaterial that he was at the moment riding in a car of the defendant, in which he was employed by it for other purposes."

Judgment on the verdict.



## RAMSEY

v.

MINNEAPOLIS AND ST. LOUIS R. R. Co.

(32 *Minnesota Reports*, 331.)

In the operation of a freight train in the night, the train broke apart, and the forward part of the train, being afterwards stopped, was run into by the detached rear cars, including the caboose, and the conductor, who was in the caboose, was killed by the collision. Evidence considered as showing that the immediate cause of the breaking apart of the train was the letting off of a brake on one of the rear cars from the jar of the car in its motion, the brake being so worn that it would not remain wound up when the car was in motion. The fact that a sudden increase of the speed of the locomotive may have contributed with the defective brake to cause the train to break apart, does not prevent the defective brake being deemed a legal and proximate cause of the result. Considered further, that the stopping of the forward part of the train, and the subsequent collision and injury, may be referred to the defective brake as a proximate cause, within the principle that a wrong-doer is responsible for injuries which might reasonably have been anticipated as a result of his misconduct.

The use by a servant of defective and unsafe machinery, delivered to him for use by the master, although the servant may have been guilty of negligence in using it, does not relieve the master from responsibility to a fellow-servant injured thereby on account of the unsafe condition of the machinery furnished.

There is no legal presumption that it is the duty of the conductor of a railway freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars if the defect was such that it might have been discovered by inspection.

APPEAL by defendant from an order of the district court for Ramsey County, Simons, J., presiding, refusing a new trial, after a verdict of \$5000 for plaintiff. The action was brought, under the statute, for damages for injuries causing the death of plaintiff's intestate.

*J. D. Springer* for appellant.

*O'Brien, Eller & O'Brien* for respondent.

DICKINSON, J.—The decision upon a former appeal in this action is reported in 30 Minn. 215. The fatal injury for which this action was brought occurred while the deceased was in charge, FACTS. as a conductor of a freight train of the defendant, running from Minneapolis to Albert Lea. The case before us fairly presents these circumstances attending the accident, and the probable theory of its cause here suggested: The train consisted of a locomotive and a long train of freight cars, with a caboose in the rear. The brake upon the second car forward of the caboose was defective; the ratchet, which is used in connection with a ratchet-wheel to

hold the brake when wound up, being so worn that the jar of the car, when in motion, would detach it from the ratchet-wheel and let off the brake. During the night, while the train was running very rapidly, the deceased, who was in the caboose engaged in the discharge of his duties, directed a brakeman to go out upon the train and apply the brakes to check its speed. This brakeman applied the defective brake, and, after holding it a short time, left it to go forward to apply other brakes. The motion of the car threw the ratchet out of its wheel and let off the brake. The tension upon the coupling apparatus being thus relieved, this car collided with that in front of it, thus checking its own speed and at the same time communicating a new impulse to the forward car. At about the same time, the forward part of the train, having passed over an ascending grade to a descending grade beyond, started at an increased rate of speed, and the coupling broke immediately forward of the car to which the brake had been applied. After the forward part of the train had gone on for a considerable distance it was stopped by the engineer and one of the brakemen, they having been informed that the train had broken apart, and the two detached cars with the caboose, running on with their own momentum, collided with the main body of the train with such force as to kill the conductor, who was still in the caboose, probably unconscious of what had occurred.

The verdict rests alone upon the alleged negligence in respect to the condition of the brake, and it is claimed by the appellant that this negligence was not the proximate cause of the injury; that the acts of the engineer and brakeman in stopping the train, which defendant claims to have been negligence on their part, was an intervening and the proximate cause of the collision. As has already been intimated, the evidence makes it at least probable, and justified the jury in their determination of the fact, that the sudden release of the brake was an immediate and direct cause of the breaking of the coupling. The starting forward of the locomotive upon a down grade may have occurred at the same instant, and may have contributed, with the collision and recoil consequent upon the sudden release of tension upon the coupling, to produce the result. But that was one of the ordinary incidents of the movement of the train, and could not effect the liability of the defendant. According to the unopposed testimony of the brakeman, whose competency is not questioned, it may be considered that the coupling would not have broken except for the sudden release of the defective brake. The breaking apart, seeming to have been a natural result,—a result likely to occur from the use of the defective brake in the ordinary operation of the train,—is legally referable to the defect complained of as its proximate cause, and the other concurring influence does not affect the responsibility of the defendant. *Griggs v. Fleckenstein*, 14 Minn. 62 (81);

PROXIMATE  
CAUSE—DEFEC-  
TIVE BRAKE.

Johnson v. Chicago, M. & St. P. R. R. Co., 13 Am. & Eng. R. R. Cas. 460; McMahon v. Davidson, 12 Minn. 232 (357); Campbell v. City of Stillwater, 32 Minn. 308.

The consequent collision is further removed from that cause in the order of events, but is it so in its causal relation? The answer, upon principles recognized as being within the scope of the maxim, *causa proxima non remota spectatur*, is not difficult. The principle is well settled that a wrong-doer is, at least, responsible for all the injuries which resulted as natural consequences from his misconduct,—such consequences as might reasonably have been anticipated as likely to occur. Griggs v. Fleckenstein, *supra*; Nelson v. Chicago, M. & St. P. R. R. Co., 30 Minn. 74; Johnson v. Chicago, M. & St. P. R. R. Co. *supra*; Martin v. North Star Iron Works, 31 Minn. 407; Savage v. Chicago, M. & St. P. R. R. Co., 13 Am. & Eng. R. R. Cas. 566; Milwaukee & St. P. R. R. Co. v. Kellogg, 94 U. S. 496; Lane v. Atlantic Works, 111 Mass. 136; Hill v. Winsor, 118 Mass. 251; Fairbanks v. Kerr, 70 Pa. St. 86; Sheridan v. Brooklyn City, etc., R. R. Co., 36 N. Y. 39; Lake v. Milliken, 62 Me. 240; Weick v. Lander, 75 Ill. 93. And whether the injury in a particular case was such natural and proximate result of the wrong complained of, is, ordinarily, for the determination of a jury. See cases above cited.

Assuming that the breaking apart of the train was an immediate and proximate result of the use of the defective brake, we find no reason for the legal conclusion that the subsequent collision is not to be referred to the same defect as its proximate cause. The liability of such a collision occurring from the breaking apart of a freight train when in motion is apparent. Many events readily occur to the mind as likely to happen, and some of which did happen in this case, to precipitate a collision, especially if the separation should occur in the night, when it might not be immediately discovered. To render the danger imminent it would be only necessary that the locomotive, with that part of the train attached to it, should be checked in its speed or brought to a stop while the detached cars were still in rapid motion. It was certainly not beyond the province of the jury to say that such a contingency was likely to occur, and that it should have been anticipated.

The case is not one for the application by the court of the rule that an intervening independent wrongful act, by which the injury is immediately caused, and for which the defendant is not responsible, forbids a recovery for the more remote cause, and remits the injured party to his remedy against him to whose misconduct the injury, is immediately attributable. Viewing the case as we must presume the jury did, we look upon the negligence of the defendant as being in operation as an efficient cause down to the time of the final catastrophe. The contributory circumstance of the stopping of the train was not an independent efficient cause of the

injury, but was a circumstance caused by the negligence of the defendant, and for which it is responsible, being but a natural and probable result of the breaking apart of the train. In this respect, and in the general features of the case, we do not distinguish it from the case of *Griggs v. Fleckenstein*, *supra*.

The defendant claims that the stopping of the train by the engineer and brakeman, after they were informed that the train had broken in two, was negligence on their part. In addition to what has already been said, we need only add, in this connection, that if the question of their act being one of negligence is at all material, we consider it as an established fact in the case. The evidence does not conclusively stamp the character of negligence upon their acts, and negligence on their part cannot be implied from the verdict.

The point is made that it was negligence for the brakeman to use this brake, he having discovered the condition of it several hours before. Very likely this is true, but it does not affect the liability of the master, nor bring the case within the rule exempting the latter from responsibility for the negligence of a fellow-servant. The master, who is bound to provide safe machinery for the use of his servants (*Drymala v. Thompson*, 26 Minn. 40; *Madden v. Minneapolis & St. L. R. R. Co.*, 18 Am. & Eng. R. R. Cas. 63), is not relieved from responsibility to an employee for a neglect of that duty, by the fact that a fellow-servant may have been guilty of negligence in using the unsafe apparatus which was committed to him to use. *Cone v. Delaware, L. & W. R. R. Co.*, 81 N. Y. 206; *Booth v. Boston & A. R. R. Co.*, 73 N. Y. 38.

It is further claimed that it is not apparent that the injury to the deceased was caused by the collision of the cars. It is sufficiently apparent from the evidence, and it is also admitted by the answer.

The first and ninth requests for instruction to the jury were properly refused, because they involved what the evidence, so far as there was any upon the point, showed to have been not the fact; that is, that it was the duty of the conductor to inspect the cars and machinery of the train, and hence that he was chargeable with contributory negligence in respect to a defect which would have been discoverable upon inspection.

There are no other points in the case upon which comment is necessary.

Order affirmed.

**Liability to Employees for Injury from Defective Machinery. Notice to Company. No Recovery if Employee had Notice.**—The plaintiff, while in the discharge of his duty as watchman for the railroad, in its yards at Texarkana, was injured by the explosion of the boiler of one of the company's locomotives, caused, as the plaintiff alleged, by a defect in the boiler, which the company might have discovered by the exercise of proper diligence. The defendant denied all knowledge of defects in the exploded en-

gine, as well as a want of care on its part. The chief point in dispute was whether the boiler had been properly tested. The evidence for the plaintiff showed that one test, usually applied, had not been applied to this boiler. On the other hand, defendant introduced the evidence of mechanics experienced in such matters who testified that the best test for finding a defect in a boiler was applied; that care and diligence failed to disclose any imperfection in the boiler. It was held that if the company omitted any test of soundness of the boiler that ought to have been made, it was guilty of negligence, and it was not for the court to take the question from the jury.

The court say: "When there is no notice to the master of defects, and no blame imputable in not discovering them, he is not liable if injury results to his employee therefrom. *Noys v. Smith*, 28 Vt. 59.

"When an injury has occurred to a servant in consequence of a defect in machinery furnished by the master, to warrant a recovery the servant must show negligence or the want of care and diligence on the part of the master in relation to the defect."

Held, also, that where a railroad company deposes the testing of machinery to agents, it will be liable to employees for injuries caused by defects which the agents failed to discover by reason of their negligence. But knowledge of defects by servants of the company, not employed to tend machinery, is not notice to the company. *St. Louis, etc., R. R. Co. v. Harper*, \*44 Arkansas Reports, 524.

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## ROCHESTER, NEW YORK AND PENNSYLVANIA R. R. Co.

v.

BRICK, Admx.

(98 *New York Reports*, 211).

B, plaintiff's intestate, was one of a number of laborers in defendant's employ, engaged in repairing a track, the use of which had been partially abandoned, and which had fallen into decay. A construction train upon which B was riding ran off the track at a crossing, and he was killed. Rain had fallen the night before, and the space alongside the rails for the flanges of the wheels to run in had become filled up with mud, which had frozen and so caused the accident. T was defendant's general foreman, having charge of the work of reconstruction and repairs. He had charge of the train at the time of the accident. It was his duty to see that the crossings were properly cleaned and kept in safe condition. He attempted to perform this duty, but failed to do it properly. In an action to recover damages for alleged negligence causing the death, *held*, that the negligence causing the injury was that of a co-employee; and that defendant was not liable; also that the fact that the duty was imposed upon B of reconstructing the entire road did not alter his relation as co-employee here.

While the rule is generally applicable that when it is the duty of the employee of a railroad corporation in the course of his work to ride over the road of the corporation, it is its duty to provide a track suitable and sufficient for the purpose and to maintain it in good order, it must be considered with some qualification when the road has become dilapidated and out of repairs and is in the process of reconstruction, in which work the employee is engaged.

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of plaintiff, entered upon an order made at the October term, 1883, which denied a motion for a new trial and directed judgment on a verdict.

This was an action to recover damages for alleged negligence causing the death of plaintiff's intestate, who was a laborer in defendant's employ. While riding upon a construction train it was thrown from the track and said intestate was killed.

The material facts are stated in the opinion.

*Sherman S. Rogers* for appellant.

*F. C. Peck* for respondent.

MILLER, J.—At the time the intestate lost his life, the railroad over which he was passing on a construction train, and upon which  
FACTS. he had been employed, had been allowed to fall into decay and was then in the process of reconstruction for the purpose of being used. He was one of a number of laborers who were repairing the track, and he had been passing over it and was familiar with it. He, therefore, took all the risks incident to the dilapidated condition in which the track then was, or which the law imposed in such cases. As an employee engaged with others in the reconstruction of the road, the company would not be liable for any injury caused by the acts of his fellow-servants.

The train ran off the track at a crossing, and the accident was attributable to the fact that rain had fallen the previous night, which had caused the mud from passing wagon-wheels to fall and fill up the space alongside of the rails in which the flanges of the wheels ought to run, and this mud being frozen solid prevented the cars from passing along on the track. Had the frozen mud been cleared away from the rails, there is no dispute but that it would have been entirely safe to run the cars on the track over the crossing. One Thompson at the time was general foreman in the business of reconstructing and repairing the company's track and had the direction of the movements of its trains, and it was his duty to see that the crossings were properly cleaned and kept in a safe condition for the passage of trains. He had charge of the train in question at the time of the accident, and attempted to perform this service, which was imperfectly done, as the result shows. The recovery in this action was had on the ground of his negligence in this respect, and the main question we are called upon to consider is, whether the company is liable for Thompson's acts and his failure to perform the duty which devolved upon him. In view of the evidence presented upon the trial, and the relation which Thompson occupied in reference to the reconstruction of the portion of the road which had been previously abandoned, and to the train as to which the accident happened, we think that no such liability existed. The rule is well settled that it is the duty

of the master to provide and maintain, for the use of his employees, suitable machinery and other instrumentalities for the performance of the duties devolving upon them, and when it is the duty of the employee, in the course of his work, to ride upon the railroad track, it is the duty of the company to provide a track which is sufficient and suitable for the purpose, and to maintain it in good order. While this principle is generally applicable to railroads which are in a state of completion, it must be considered with some qualification in reference to a road which had become dilapidated and out of repair, and was in the process of being reconstructed.

It may be assumed, we think, that the deceased, in performing the services in which he was engaged and in travelling on the construction train, understood that he was not working upon a road which was finished and in good repair, but NOTICE OF DEFECTS IN ROAD. upon one which, having been long neglected and but little travelled, and latterly only by construction trains, subjected him to greater risks and perils than would be incurred under ordinary circumstances. In entering the defendant's service he assumed the hazards incident to the same. One of these hazards was the condition of this crossing, which was at this time in connection with the remainder of the road out of order, and its liability at that season of the year to be obstructed in the manner it was. The obstruction was not a defect of an intrinsic character, and no reported case holds that, under the circumstances here presented, the master would be liable. While it is difficult to define the exact duty to employees, devolving upon corporations in reference to maintaining their roads in good condition in all cases, it can scarcely be said that they are bound to protect them against obstructions which arise from temporary and extrinsic causes. There certainly should be great hesitation in exacting the same measure of protection in a case presenting the features of the one now considered, as would be demanded where the road was in good repair and in actual use. The injury here had its origin in circumstances arising from the condition of the weather which affected the crossing. If the crossing and the road had not been out of repair, it is hardly probable that the accident would have occurred.

Under ordinary circumstances, where the road is in good condition and properly protected, cases frequently arise when the company would not be responsible. In cases where there is a slight accumulation of ice, or where the track has been snowed under, and the employee, to whom that duty was assigned, has neglected to clear it in season, the company would not be liable in case of accident to an employee. Certainly such liability was not incurred where the employee took upon himself the risks of the construction train and the incidents of the work of repairing and reconstructing an old and worn-out railroad. There was then no liability of the

defendant for the damages sustained by reason of the death of the intestate.

More especially is such the case when the individual who had charge of the construction train, and the reconstruction of the road, was chargeable with negligence in performing such work as was necessary to keep the track in good condition. In the capacity in which he acted, he was only a fellow-servant, and for his negligence the defendant was not responsible, according to well-settled rules of law. The fact that Thompson had imposed upon him larger duties, embracing the reconstruction of the entire road, does not alter his relation here, and it is sufficient to say that at this time he was acting as foreman or superintendent of a number of men employed by the company to repair its old road, and was on the construction train for that purpose. He thus became, and was a co-employee with the others who were there, and was not relieved from responsibility because he had other and more important duties to perform outside of those in which he was specifically engaged. Even if Thompson may have been regarded as representing the master in some respects in reference to the road generally, the duties he was at this time performing were those of a fellow-servant and not of the master, and hence if he was chargeable with negligence it was that of a fellow-servant, and not of the master, within the principle of well-considered cases. *Crispin v. Babbitt*, 81 N. Y. 516; *McCosker v. Long Island R. R. Co.*, 84 Id. 77; s. c., 5 Am. & Eng. R. R. Cas. 564.

It follows that the court erred in holding that the defendant was liable for the negligence of Thompson, and in denying the motion to dismiss the complaint.

There was also error upon the trial in the refusal of the judge to charge that if Mr. Thompson knew of the defect proven in the crossing, and he undertook to start the train without removing it, that it was the negligence of a co-employee, and the plaintiff cannot recover. As we have already seen, if Thompson was a co-employee and was chargeable with negligence producing the death of the intestate, the defendant was not liable, and the request should have been granted.

Some other points are raised which it is not necessary to consider, as, for the reasons already stated, a new trial should be granted.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur (EARL, J., on last ground stated in opinion), except DANFORTH, J., absent.

Judgment reversed.



## NEW YORK, LAKE ERIE AND WESTERN R. R. Co.

v.

POWERS *et al.*, Adm'rs.(98 *New York Reports*, 274.)

P., plaintiff's intestate, an employee of the defendant, was killed by being thrown from a hand-car on its road. Two or three weeks before the accident one of the handles to the walking-beam of the car was broken, but the employees continued to use the car, the handle of a pick or an iron crowbar being inserted in the place of the broken handle. This was done without any direction of the section-boss. At the time of the accident a crowbar was being used, one end of which projected four feet, the other one and one-half feet from the socket of the lever, and to get out of the way of an approaching train five men were working on the crowbar, instead of three, the usual number—three including the intestate working on the long arm. This manner of working wrenched the lever so that it broke, and P. was thrown from the car and killed. In an action to recover damages, *held*, that by riding on the hand-car with knowledge of the defect and aiding in such use of the crowbar, P. assumed all risks of injury resulting therefrom; and that plaintiff was properly nonsuited.

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made April 5, 1884, which reversed an order nonsuiting plaintiff on trial, and granted a motion for a new trial, exceptions having been ordered to be heard at first instance at General Term.

*E. C. Sprague* for appellant.

*M. E. Bartlett* for respondents.

MILLER, J.—The intestate was killed by being thrown from a hand-car which he and other employees were propelling upon the defendant's road. The complaint alleged that the hand-FACTS. car was unsafe and improperly constructed, and the proof showed that two or three weeks before the accident one of the handles to the walking beam was broken and that defendant's employees continued to use the car with the handle of a pick or an iron crowbar in the place of the broken handle, it being inserted in the socket by some of them without any direction from the section boss. The crowbar was about five and one-half feet in length, and when used as a handle one end projected four feet and the other one and one-half feet from the socket of the lever. On the day of the accident some of the workmen had inserted the crowbar in the place of the handle that was gone, and observing a train approaching from behind on the same track, instead of removing the hand-car to the other track, as was usually done, they started to

run it to a distant switch and thus escape the train. They worked the car with all the force they could, using five men on the crowbar instead of three, the usual number. Three of them, including the intestate, were on the long arm, one on the short arm, and one in the centre. The working of the crowbar by the men in the manner in which it was done evidently wrenched the lever or beam by which the car was operated, so that it broke, throwing the intestate under the car and killing him. Prior to the accident the intestate had full knowledge of the defect in the hand-car and voluntarily continued in the employ of the defendant without complaining of or objecting to it. By riding on the car and aiding, by the use of the crowbar, in propelling it along on the track, he assumed all risks of injury resulting from the use of the crowbar or from the negligence of his fellow-servants, without any regard whatever to the question whether the defendant knew of the defect or ought to have had knowledge of the same. (2 Thomp. on Neg. 1008 *et. seq.*; *Gibson v. Erie R. R. Co.*, 63 N. Y. 453; *De Forest v. Jewett*, 88 Id. 264; s. c., 8 Am. & Eng. R. R. Cas. 495.) The deceased was an employee on the road, and no doubt was possessed of the ordinary judgment and sense of those who occupied a similar position. He had sufficient knowledge to understand the ordinary rules which were applicable to the use of a car which was partially disabled, as was the case here. He must have known that the use of the crowbar required the usual care, and would not be as safe and secure as if a proper handle had been in use. He must also have known that the application of extraordinary force, under the circumstances, might perhaps cause the accident by wrenching the walking beam, as was done by such a use of the crowbar in this case. It did not require a special knowledge or skill to determine that an unusual application of force might result either in the breaking of the handle or the walking beam. Working on the car as he did, with ample knowledge in regard to its operation, and fully aware of its condition, there would seem to be no ground for claiming that there was any question of fact for the consideration of the jury as to the intestate's knowledge of the risk he incurred in using the car and improperly using the crowbar in propelling the same.

There is a class of cases in the books in which it is held that the question arising as to the knowledge of an injured party in regard to defects in machinery or materials may be submitted to the jury, but these cases are all clearly distinguishable from the one at bar, where it is plainly apparent that knowledge must have existed as to the character of the implements or machinery employed, and of the risks incident thereto, and that the injured party acted with an entire appreciation of the actual condition of the car on which he was riding, fully realized the state in which it was, and did not deem it essential to make

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any complaint, or give any notice to the defendant that he considered it unsafe or unfit for use. In the case of *East Tenn., etc., R. R. Co. v. Smith*, 9 Lea (Tenn.), 685; s. c., 15 Am. & Eng. R. R. Cas. 224, the accident occurred by reason of the breaking of a handle on a hand-car under circumstances similar to those presented in the case at bar, and the question discussed was as to the defect in one of the wooden handles of the lever which was claimed to be too small for the purpose, and it was held by the court that the determination of such a matter required no special knowledge or scientific skill, and if with such knowledge the plaintiff elected to continue in the service, he should be regarded as voluntarily electing himself to take the risk.

This rule may be invoked with far greater reason in the case considered, where the simple question was, whether the car could be properly used in the manner it was after substituting a crowbar in the place of the handle.

We are referred to the remarks in the opinion in the case of *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521, to the effect that if the servant remains in the service after a defect arises and complains of the same, it is for the jury to say whether or not he voluntarily assumed the risk of defective machinery whereof he has full and equal knowledge. The alleged defect in that case was the employment of unfit men, of which the person injured had knowledge and made complaint, and while the rule stated may well apply to such a case, it cannot be regarded as pertinent to one where it is clear and unmistakable that the employee not only had knowledge but a full appreciation of the character of the instrumentalities with which he was working, and made no complaint.

It is true that regard must be had to the limited knowledge of the employee as to the machinery and structure on which he is employed, and to his capacity and intelligence, and that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise (*Connolly v. Poillon*, 41 Barb. 366), but this rule should not be invoked where it is entirely apparent that the servant has an intelligent and clear comprehension of the nature of the risks to which he is subjected. Some other cases are cited by the respondents' counsel, but they are all distinguishable from the case at bar, and none of them hold that where the evidence clearly shows that the person injured had full knowledge of the defect, and intelligently and completely appreciated its true character, there was any question of fact for the consideration of the jury.

It is apparent, we think, under the facts presented, that the intestate, with full knowledge of the defects in the car, assumed the responsibility of working on the same and the risks arising therefrom, and that no liability was incurred by

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the defendant by reason of the accident which caused his death. There is far stronger reason here for relieving the defendant from liability, where the defect did not exist originally, and when the servant upon discovering it failed to perform his duty in notifying the master, than under ordinary circumstances. By his neglect of duty in this respect he was chargeable with contributory negligence, which prevents his recovery of damages on account of being injured by reason of the use of the defective hand-car.

We are also of the opinion that the action cannot be maintained for the additional reason that the deceased was chargeable with contributory negligence in the use of the hand-car, by himself and his fellow-servants, in the manner in which it was propelled at the time of the accident. It was clearly negligence to seek to avoid the train in the manner they did. The deceased participated with his fellow-servants in this act and was responsible for the consequences which followed.

There was no question of fact for the jury upon the trial, and, for the reasons stated, the motion for a nonsuit was properly granted, and the General Term erred in reversing the judgment.

The order of the General Term should be reversed and judgment entered on the order nonsuiting plaintiff at Circuit.

All concur.

Order reversed and judgment accordingly.

**Injury by Defective Cranks on Hand-car.**—Bell was ordered by Wade, his superior officer, to help run the crank of a hand-car. Examining it, he called Wade's attention to the fact that one handle was longer than the other, but Wade told him that if he would be careful, he did not think there would be any danger, and Bell did not think so either. But the handle worked out a little further during the trip, and while Bell was putting on the brakes, struck the dashboard of the car, caught in Bell's clothes, and bruised and "scared" him pretty badly. *Held*, that as he knew of the dangerous condition of the hand-car, and, nevertheless, made use of it, he could not recover, and that it did not alter the case that the employee knowingly undertook to use a dangerously defective tool under the immediate command of a superior employee. *Bell v. Western & A. R. R. Co.*, \* 70 Ga. 566.

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## WARDEN

v.

OLD COLONY R. R. Co.

(187 *Massachusetts Reports*, 204.)

A railroad corporation is liable to one of its employees for an injury occasioned to him by being struck by a bridge-guard, if the guard is out of its proper position, and this is caused by the wearing-out of a rope attached to

the guard, and the corporation has not made suitable provision to have notice of, and to remedy, defects liable to be occasioned by its use.

*A. H. Briggs* for plaintiff.

*J. H. Benton, Jr.*, for defendant.

ALLEN, J.—In this action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, the defendant contended at the trial that it was FACTS entitled to judgment, as matter of law; and the only question reported is whether, as matter of law, the judgment for the plaintiff was warranted by the evidence. The only objection made at the argument was that there was no evidence of negligence on the part of the defendant.

The evidence tended to prove that the plaintiff, while pursuing his duties as a brakeman in the defendant's freight-yard, was pushed from the top of a freight car by a bridge-guard, called in the declaration a telltale. This was a strip of wood, which extended over the track at a height to strike a person standing upon a car, and which turned easily upon a pivot on a post by the side of the track. When it came in contact with a person standing on a car, it easily swung round on the pivot, and was brought back to its place over and at right angles to the track, and held there by means of a weight attached to it by a rope. There was evidence that the bridge-guard was out of position, in consequence of the weight having become detached by the breaking of the rope, and extended diagonally over and to about the middle of the track, so that the end of it came against the plaintiff, who was on a moving car, and pushed him from the car. There was no evidence that the bridge-guard was not in its device, and as originally constructed, suitable and safe; and we do not think that the judge, who tried the case without a jury, could have found for the plaintiff upon the ground that the rope had been broken for so long a time that notice to the defendant of that fact could be inferred; but we think that there was evidence which presented the question whether the defendant exercised due care in regard to the condition of the rope, and made suitable provision to have notice of, and to remedy, defects liable to be occasioned by its use. There was evidence that the rope was worn off by use, and that that was the natural consequence of the use for which it was intended and which it was put to; and the judge may have found, upon the evidence, that no provision was made for examining the rope, or being informed of its condition from time to time, or for renewing it when it should become worn and unsafe. The only person who appears to have had any supervision over the bridge-guards, of which there were about twelve in the freight-yard, was the yard-master, who, as was testified by the transportation-master, was delegated by him "to look after the freight-yards, switches, bridge-guards, etc.," and whose duties were,

as testified, "to see that the switches, bridge-guards, and everything in that line were all right, and when anything was out of order to report to" the transportation-master. The yard-master testified that "no one had reported to him that the ball was off;" "that, if anything was out of repair, it was reported to him, and he reported to the proper authorities, and had it fixed." He further testified that he passed this bridge-guard every day when his business called him to the cattle-yard, and that he might have gone there that morning; but he does not say that it was made any part of his duty to examine the condition of the ropes of the bridge-guards, or to observe whether they became worn or needed renewal; and the judge may have found, upon the evidence, that no provision was made for repairing or renewing the ropes before they should become worn out and broken by use.

It was the duty of the defendant to provide suitable means for keeping the rope in a safe condition, and neglect of that duty would be the direct negligence of the defendant, for which it would be liable, even if the negligence of a fellow servant with the plaintiff contributed to the injury. *Johnson v. Boston Tow-boat Co.*, 135 Mass. 209.

We think that the question whether the defendant was negligent in not making suitable provision for maintaining the rope in a safe condition was presented by the evidence; and we cannot say, as matter of law, that the finding of the court was not warranted by the evidence.

Judgment for the plaintiff.

## EAST TENNESSEE, VIRGINIA AND GEORGIA R. R. Co.

v.

STEWART.

(18 *Lea's (Tenn.) Reports*, 482.)

In an action by an employee against his employer to recover damages for an injury to the plaintiff caused by a defective machine or tool, the burden of proof is upon the plaintiff, and it was therefore error in the trial judge to charge that the burden of proof was upon the defendant to show that the machine or tool was suitable and sufficient.

As a general rule, proof of the mere fact of injury will not, without more, establish negligence on the part of the defendant so as to shift the burden of proof.

The cases in which proof of the injury and that it was caused by the defendant will entitle the plaintiff to recover in the absence of countervailing testimony, are cases in which the evidence that establishes the injury establishes also facts and circumstances from which negligence on the part of the defendant may be fairly implied.

Where a fireman on a locomotive was injured by a jet of steam from an oil-cup, which he was in the act of filling, and the proof left it doubtful whether the accident was the result of his own negligence or occasioned by a defect in the cup or its appliances, the case would be within the general rule not the exception, and the burden of proof would rest on the plaintiff.

APPEAL in error from the Circuit Court of Sullivan County.

*W. D. Haynes, N. M. Taylor, and W. M. Baxter* for railroad.  
*C. J. St. John and Thomas Curtin* for Stewart.

COOPER, J.—Action brought by Stewart against the railroad company for personal injuries. The verdict and judgment were in favor of Stewart, and the company appealed in error. The referees report that the judgment should be reversed for error in the charge of the trial judge to the jury. Both parties except, opening the whole case.

Stewart was injured in the face and eyes by an explosion of steam and tallow from an oil-cup. There are two oil-cups on a locomotive, one on each side about the centre of the FACTS. steam-chest, and they require to be filled for about every seventy miles of travel. Each cup connects with the steam-chest by a pipe, which enters the bottom of the cup and runs up the centre, the access of steam being controlled by a stop-cock. There is also a waste-cock at the bottom of the cup by which its contents may be drained off. When the cups are filled, the steam is first shut off, the waste-cock opened, and the top of the cup raised and removed to one side by a yoke working a screw. Stewart had been a fireman on railroad locomotives for two or three years before the injury complained of, and in the employment of the defendant below for at least a year. It was a part of his duty as a fireman to fill the oil-cups. The company had the same kind of cup on a number of its engines, and Stewart was, he says, familiar with them, or, to use his own words, "knew all about the cup so far as putting in tallow was concerned." He had made one trip on the particular engine about ten days before the accident occurred, the oil-cups being then all right. On the day of the injury he had filled both cups in the morning before the engine was hot, and could not therefore tell if the oil-cups were right. After running about seventy miles the train stopped, and he undertook to fill the cups. He filled the right-hand cup, finding it all right, and then went to the left-hand cup. His statement then is: "I first shut off steam by closing the feed-valve (meaning the valve of the steam-cock). I then opened the waste-cock. I then took off the yoke, but the cap still remained on the oil-cup. I tried to remove the cap with my hand, but it was closed tight and could not be moved. I then set my oil-can on the left, and stooped over to get a block that was on the engine to knock the cap off the cup. The block was on the right. While I was stooping the cap flew off, and the tallow flew in my face and

eyes." The witness adds: "The pee on steam-cock must have wasted or leaked. This is all the way I can account for the explosion." The other witnesses say that it is impossible to have an explosion of an oil-cup unless the valve is left open, or the steam is escaping because of some defect in the stop-cock. It is obvious, therefore, that the explosion was occasioned either by the negligence of the plaintiff in not properly closing the steam-cock, or from some defect in the cock which allowed a sufficient quantity of steam to pass through the tube projecting into the cup. In the latter event, the defect was one which could not be seen from the outside, but the existence of which could easily have been ascertained by means of the waste-cock.

The trial judge charged the jury that: "The burden of proof is ACCIDENT TO  
SERVANT—BUR-  
DEN OF PROVING  
THAT MACHINERY  
WAS DEFECTIVE on the defendant to show that its oil-cup and appliances were suitable, sufficient, etc., under the instructions heretofore given." These instructions were that railroad companies are required to furnish their employees suitable and safe machinery and tools with which to operate, subject to the qualification that the employee takes the risk of defects known to him at the time of employment, or which may afterwards become known, and for the repair whereof no promise has been made by the master after notice. But, as is well said by the counsel of the railroad company, the obligation to furnish safe and suitable machinery is one thing, and the burden of proof when an accident occurs is another and a different thing. And the question presented by the judge's charge, upon the supposition that the injury to the plaintiff below was occasioned by a defect in the oil-cup or its appliances, is whether the burden of showing the defect rested upon the plaintiff or not.

The gist of the action, as set out in the declaration, is that the explosion, which occasioned the injuries sued for, was "caused by reason of said oil-cup being defective and not kept in proper repair." The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue: 1 Greenl. Ev., sec. 74. "No one," says Mr. Justice Field, "is responsible for injuries resulting from inevitable accident whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it." The Nitro Glycerine Case, 15 Wall. 524. The presumption of law, moreover, is always in favor of the performance of duty. Polk v. Kirtland, 9 Heis. 292, 295. And consequently, in a suit between employee and employer for an injury caused by a defective machine or tool, the presumption would be in favor of the employer, and must be overcome by proof. Railroad v. Gurley, 12 Lea, 46, 58; s. c., 17 Am. & Eng. R. R. Cas. 568. And accordingly in Railroad v. Duffield, 12 Lea, 63, 71, which was such a case, it was expressly said that the trial judge erred in charging that "the burden of proof is on the defendant to show that it pro-



vided the plaintiff with tools and implements safe, suitable and sufficient;" and also erred in refusing to charge, as requested by the company, that "the law presumed that the master had performed the duty the law imposes to furnish safe and suitable machinery, and the burden of proof is on the plaintiff to show that this duty has not been performed."

There are cases in which proof of the injury complained of, and that it was caused by the railroad company, will entitle the plaintiff to recover unless rebutted by other testimony. And it is usual to say in such cases that the requisite proof on the part of the plaintiff shifts the burden of proof upon the defendant. It has been repeatedly held in this State that where an injury, either to persons or stock, is shown to have been occasioned by the moving train of a railroad company, it then becomes incumbent on the company to show that it exercised all the care it was bound to exercise, in doing which it would necessarily establish the sufficiency and safety of its machinery. *Railroad v. Horne*, 1 Cold. 72; *Railroad v. Connor*, 9 Heis. 19. So, where the plaintiff's house is proved to have been burned by sparks from the defendant's engine, it devolves on the company to show that the engine was properly constructed, and in good condition. *Burke v. Railroad*, 7 Heis. 451; *Simpson v. Railroad*, 5 Lea, 456; s. c., 6 Am. & Eng. R. R. Cas. 611. So, where the plaintiff has established the existence of a nuisance to his dwelling-house by the coal-dust arising from the company's coal-chutes or boxes, the company must show proper care in the erection and use of the chutes or boxes. *Sallee v. Railroad* (manuscript opinion at this term). So, the mere explosion of a steam-boiler may justify the jury in finding negligence as an inference of fact. *Young v. Bransford*, 12 Lea, 232. The rule is otherwise in the case of injury to a passenger or a trespasser. *Railroad v. Mitchell*, 11 Heis. 400; *Sommers v. Railroad*, 7 Lea, 204. Unless, indeed, in the case of a passenger, the proof which establishes the injury shows also that it was occasioned in a particular manner that in itself would imply negligence. *Curtis v. Railroad Company*, 18 N. Y. 543; *Holbrook v. Railroad Company*, 12 N. Y. 236. The reason of the rule, therefore, whenever it is applied, is that the evidence which establishes the injury establishes also facts and circumstances from which negligence on the part of the wrongdoer may be fairly implied. 2 Pars. Cont. 224. Or, as it is otherwise expressed, *res ipsa loquitur*.

The general rule undoubtedly is that the mere fact that the injury happened to the plaintiff will not, without more, amount to evidence of negligence on the part of the defendant. 2 Thomp. on Neg. 1227. The duty of making out his case is upon the plaintiff, and it is not strictly accurate to say that the burden of proof is shifted to the other side. The proper charge would be that if the

WHEN BURDEN  
OF DISPROVING  
NEGLECTANCE IS  
ON DEFENDANT.

jury were satisfied from the proof that the injury had been occasioned by the defendant under such circumstances as to show negligence on the part of the defendant, then they should find for the plaintiff unless the proof further satisfied them that the machinery of the company was in good condition, and up to the present state of the art, so as to prevent as far as possible the happening of such accidents as the one complained of. The liability of the company to an employee would be further limited by the usual qualifications growing out of the relation of master and servant.

The proof in the case before us shows that the plaintiff was injured by a jet of steam from the oil-cup. But it also shows that the accident might have been occasioned by the negligence of the plaintiff himself in failing to close the steam-cock. The facts and circumstances do not necessarily or fairly carry with them an implication of negligence on the part of the company. To raise the presumption of negligence it should further appear that the injured party was without fault. *Railroad v. Walrath*, 38 Ohio St. 461. The burden of proof was upon the plaintiff to show negligence. And his Honor, the trial judge, was in error in charging otherwise.

Error is assigned upon the admission, over the objection of the defendant, of the deposition of the wife of the plaintiff. The objections now made are that the wife's information about the case was obtained "by virtue, or in consequence of the marital relation," and that her testimony was mere hearsay. The record shows that the plaintiff offered to read the deposition, "to which defendant objected," and the court permitted it to be read. The objection thus made would only go to the competency of the witness. *Miller v. State*, 12 Lea, 225, and cases therein cited. The witness was competent to prove facts within her knowledge, and her testimony only inadmissible as to "any matter which occurred between them (husband and wife), by virtue of or in consequence of the marital relation." Act of 1879, ch. 200.

Other errors relied on are not likely to occur upon another trial.

The report of the Referees will be confirmed in accordance with this opinion, the judgment below reversed, and the case remanded for a new trial.

## LITTLE ROCK AND FORT SMITH R. R. Co.

v.

TOWNSEND, Adm'r.

(41 *Arkansas Reports*, 382.)

The Arkansas act of February 8, 1875, gives to the administrator the right to recover damages for the negligent killing of his intestate by a railroad train; and the amount recovered becomes a part of the personal assets of the deceased, to be distributed according to the administration laws of the State.

Instructions inapplicable to the facts proved, and calculated to mislead the jury, or based upon unproved hypotheses, should not be given.

A brakeman on a moving train fell between cars while engaged in uncoupling them, and into a culvert, so that he was killed. *Held*, that there was no evidence of any such defect in the cross-ties or culvert as would render the company liable.

A brakeman assumes all risks necessarily incident to his employment; and to give him a right of action against the company for injuries sustained in its service the company must have owed him some duty, arising from contract or from the relation itself; and the failure to perform that duty must have been the proximate cause of the injury.

APPEAL from Pulaski circuit court.

*Clark & Williams* for appellant.

*Collins & Balch* for appellee.

SMITH, J.—This action against the railway company was brought by John D. Townsend, who sues as administrator of John Willette, deceased.

The complaint alleges, in substance, that on and before the tenth day of October, 1881, John Willette was in the employ of defendant company as brakeman on one of their trains of cars. FACTS.

That defendant's railway, in the town of Conway, in Faulkner county, was in a defective, unsafe, and dangerous condition in this, that a culvert in the track in said town of Conway was left uncovered, and the cross-ties over the same had become rotten and unfit for use. That the company, in wanton disregard of their duty, well knowing of such defects, continued to run their trains over such defective road, and to require their employees, among whom was the said John Willette, to operate their trains, and to couple and uncouple cars over such defective road after the company had notice of such defects.

That said John Willette, while engaged in the performance of his duties as such brakeman, under his contract, by direction of defendant, without fault on his part, and while coupling and uncoupling cars on said road in said town of Conway, was, by the

breaking and giving way of a part of said roadway over the said culvert, thrown into the said culvert and run over by defendant's cars, and then and there, by defendant's wilful and gross negligence, wounded, cut, and bruised, and from the effects of the same, afterwards, on the tenth day of October, 1881, died.

That said Willette was an adult and unmarried at the time of his death.

The damages were laid at \$10,500.

The defendant admits the injury by which the deceased lost his life, but denies that it occurred in the manner stated, or through any defect of roadbed or culvert, or on account of any culvert being uncovered, or rotten ties, or through or on account of any negligence or want of care on the part of defendant in the use of proper roadbed or tools or machinery, or in the selection of servants or employees, or on account of any other negligence or fault of the defendant, but alleges that he came to his death by unavoidable accident, or by and on account of his own carelessness, or the risks incident to his employment.

The jury gave the plaintiff a verdict for \$3910, which included \$110 funeral expenses.

A motion to arrest the judgment was overruled. It is now contended that the judgment should have been arrested because the complaint does not show that the deceased left any relations who were injured by his death, and that his administrator cannot maintain an action for such a cause for the general benefit of the estate. It is insisted that causing the death of a man does not damage his estate, and that, damages being the substance of the action, in the nature of things, if there be no damage, there can be no right of action.

In the absence of a statute this contention would be correct. For an injury resulting in death the common law gave no action to any one. But at the time of Willette's death the following statutory provisions were in force:

Gantt's Digest, sec. 4760: "For wrongs done to the person or property of another, an action may be maintained against the wrong-doers, and such action may be brought by the person injured, or after his death by his executor or administrator, against such wrong-doer, . . . in the same manner and with like effect in all respects as in actions founded on contracts."

Act of February 3, 1875, sec. 1: "All railroads which are run, or may be hereafter built and operated, in whole or in part, in this State, shall be responsible for all damages to persons and property done or caused by the running of trains in this State."

Sec. 3: "When any adult person be killed by railroad trains running in this State, the husband may sue for damages to a wife. In all other cases the legal representative shall sue."

Since the present appeal was taken, our legislature has enacted

ACTIONS AGAINST  
RAILROAD BY  
ADMINISTRATOR  
FOR DEATH OF  
DECEASED.

another law requiring compensation to be made for causing death by a wrongful act, neglect, or default, modelled after Lord Campbell's "Act for compensating the families of persons killed by accidents" (August 26, 1846, 9 and 10 Victoria, c. 93). It provides that the action shall be brought in the name of the personal representatives of the deceased; or if there be none, then by his heirs at law; and the amount recovered shall be for the exclusive benefit of the widow and next of kin; and that the damages are to be estimated with reference to the pecuniary injuries resulting from such death to the wife and the next of kin. Under similar statutes elsewhere it has been ruled that the existence of persons entitled to the amount recovered is essential to a recovery, and must be alleged in the declaration and proved on the trial; and that the measure of damages is the pecuniary injury suffered by the person or persons for whose use the action is prosecuted. And the judgment, though recovered in the name of the personal representative of the deceased, does not become assets of the estate. The relation of the administrator to the fund, when recovered, is not that of the representative of the deceased, but he is a mere trustee for the widow and next of kin. *Pierce on Railroads*, Ed. 1881, pp. 392-3, and cases cited in notes; *Dennick v. Railroad Co.*, 103 U. S. 11; s. c., 1 Am. & Eng. R. R. Cas. 409; *Perry v. St. Joe & W. R. R. Co.*, 29 Kana. 420; s. c., 11 Am. & Eng. R. R. Cas. 663.

But the act of March 6, 1883, having become a law since the casualty here complained of, has no bearing on this case. And since all of the arguments of the appellant's counsel against the administrator's right to sue for the benefit of the estate are drawn from the construction placed by the courts upon Lord Campbell's act and similar statutes, we might dismiss this branch of the case without further remark. We will say, however, that although the Act of February 5, 1875, is crude, loosely drawn and imperfect, yet its meaning is not obscure. It gives to the legal representative, that is, to the administrator, the right to recover damages for the negligent killing of his intestate by a railroad train. And the amount recovered is a part of the personal assets of the deceased, and takes the direction given them by the law; that is to say, one-third of the amount is to be distributed to the widow, if there be any; then creditors are to be paid in full or *pro rata*, according to circumstances; and the surplus, if any, goes to the next of kin in the proportion provided for in the distribution of personal property under the statute.

Now as a question of power, it is just as competent for the legislature to provide that the fruits of such a judgment shall be assets in the hands of the administrator, as it is to provide that they shall be distributed to the widow and next of kin. The authority of the legislature in the regulation of legal remedies is supreme. And the difficulty as to the proper measure of damages is one which is

inherent in the subject, and is as great whether the action be for the benefit of the estate in general or for the benefit of the widow and next of kin; or if there is a difference, it is a difference only in degree. The same difficulty presents itself where a person is wounded by the negligent operation of a train, and the action is in his own name. "There can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body. So, when the suit is brought by the representative, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. If the deceased had lived, they may not have been benefited, and if not, then no pecuniary injury could have resulted to them from his death. So, when the action is for the benefit of his estate, it is possible that, if the intestate had not been killed, he might, nevertheless, not have lived long, or he might have become a cripple, or an invalid, and incapable of earning anything, or if he had lived to old age, might never have accumulated any property. The statute seems to proceed on the idea that "if the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed over" to his personal representative to be administered according to law. "In case of his death by the injury, the equivalent is given by a suit in the name of his representative." In all the cases put, it is difficult to get at the pecuniary loss with precision or accuracy, and, in all, the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury. *Railroad Company v. Barron*, 5 Wall. 90.

In connection with the power of the legislature to prescribe the mode of proceeding to compel the wrong-doer to make compensation for a fatal injury to those who are directly interested in the life of a person wrongfully killed, we notice that in Massachusetts, Maine, and New Hampshire, the remedy is by prosecution on behalf of the State, in form, criminal, for the recovery of a fine, to be distributed among certain relatives of the deceased. *Pierce on Railroads*, 387, where the Massachusetts statute is copied *in extenso*.

The act of February 3, 1875, sets a value in money upon the life of a human being, and for its wrongful or negligent deprivation by a railroad corporation, gives a right of action to the administrator, who represents, collectively, all who were interested in the continuance of that life, whether as wife, as creditor, or as distributee.

II. The defendant also moved the court below to grant it a new trial, because the verdict was without evidence to sustain it, and was contrary to law and the instructions of the court, and for misdirection of the jury, and for excessive damages. The evidence tended to show that Willette was a brakeman, attached to one of

the company's freight trains; that he had been in its employment for two and one-half months, and that his business was to couple and uncouple cars, and to stop the train. He was twenty-five years old, was sound and healthy, as we learn from the testimony of his father, and his wages were two dollars and fifty cents per diem. He met his death at Conway station on a dark and rainy night. The train hands were switching some cars from the side track to the main track. When the cars were got upon the main track, he was told by the conductor of the train to cut off four of them. In the act of doing this he fell under the wheels and was run over. No witnesses knew what caused him to fall under the wheels. A fellow-brakeman who was nearest to him and the first to reach him after his fall, died before the trial. The conductor, who was the next person to go to him, did not see him when he fell.

But it was the plaintiff's theory that his intestate got down between the two cars to pull out the coupling-pin, and the train starting to move backwards, he placed his foot on a cross-tie, which, on account of its age and rottenness, broke under his weight and precipitated him under the wheels. All the evidence that can be found in the record to support this theory is, in substance, as follows: There was an open or uncovered culvert one hundred and fifty yards from the depot, eight feet wide and two or three feet deep, made to drain off the waters of the surrounding country. Between the rails a plank ten or twelve inches wide spanned the culvert. The cars which Willette was required to uncouple were standing on this culvert. Next morning the coroner, in examining the spot, found, at the bottom of the culvert, a piece of sap wood that had scaled off the edge of a tie. This piece of wood was between nine and twelve inches long, and one or two inches thick. There was dirt on the tie or on the piece of wood and the appearance of something having pressed down the piece off the tie, but no impression of a man's foot. There was no evidence that this tie was rotten, except the sap surface.

This is a slender thread to hang a verdict upon, which, in order to stand, must be based upon affirmative proof of the company's negligence. No connection is shown between the alleged defect in the culvert and Willette's death. Several persons—it is impossible to say how many, but certainly those who came and removed the body—had been around and about the spot, any one of whom might have kicked off this fragment of decayed wood, as well as Willette. The fact that the culvert was uncovered is not *prima facie* proof of negligence, since the legislature has not required them to be covered, nor is it customary to cover them, nor is its open condition proved to have had any relation to the injury complained of. If Willette had slipped into the culvert the cars would probably have mutilated his body or legs, but such was not the case.

The court gave the following amongst other directions:

“If the jury believe from the evidence and circumstances of this case that plaintiff's intestate was killed by reason of defective and decayed cross-ties over a culvert on the road of defendant, when it was necessary for the deceased and other employees of defendant frequently to pass in coupling and uncoupling cars, and that said defendant railroad company, through its agents, knew of said defect, or might have known by the use of ordinary care or diligence; and if the jury find further, that said cross-tie was so defective or decayed as its use would naturally and reasonably be dangerous, they should find for plaintiff, unless they also find that said intestate was also in fault at the time of the accident, and by reason of his fault contributed to the injury; or that he knew that the cross-tie was decayed or defective, or ought by ordinary care to have known it, and that the defects were of such a nature as would induce him reasonably to foresee what might endanger his safety.

“If there was a culvert at the place at which deceased was killed, and over which the deceased or other employees of defendant had frequently to pass in coupling and uncoupling cars, it was the duty of defendant to exercise ordinary care in the construction and maintenance of such culvert to protect the employees of defendant from accident. And if the jury find from the evidence that defendant failed to exercise ordinary care in the construction and maintenance of said culvert, and that deceased was thrown down by reason of the defects in said culvert and killed by the cars, they will find for the plaintiff, unless they also find that such defects were known to the deceased, or by the exercise of ordinary care and caution he ought to have known them.”

These instructions were inapplicable to any state of facts in proof, and were calculated to mislead the jury. There was no testimony from which the jury could legitimately infer that Willette was thrown down and killed by reason of a defective culvert or a defective cross-tie. Instructions should not be based upon unproved hypotheses.

In the first place there was no evidence of any defect in the culvert or in the tie. They were constructed and placed in position to form a secure road-bed for the passage of defendant's trains, not to furnish a footpath or standing place for defendant's employees or others; and there is nothing to show that they were inadequate or ill-adapted to the purpose for which they were designed.

The court also refused the following prayer of the defendant:

“If the jury believe from the evidence that the deceased, in the performance of his duty as the employee of the company, went upon the culvert under the road-bed to couple or uncouple cars, and was injured thereby, or by stepping upon the edge of a tie at the side of a culvert, such

INSTRUCTION:  
INAPPLICABLE  
TO EVIDENCE.

BRAKEMAN:  
RIGHTS AND  
RISKS.



edge scaling and giving away, whereby he fell and was injured, such facts do not tend to prove negligence on the part of the defendant."

The employment of brakeman on a railroad is extra hazardous in its nature. For this he is in some degree compensated by high wages paid for mere manual labor, not requiring any special skill or previous training. He assumes all risks, necessarily incident to his employment, and to give him a right of action against his employer for an injury sustained in its service, the company must have owed him some duty arising from contract or from the relation itself; and a failure to perform that duty must have been the proximate cause of the injury. Undoubtedly the master is bound to furnish his servants with proper machinery, agencies, and instrumentalities for the due conduct of his business; and this in the case of a railway company includes a safe and sufficient roadway. But here the road-bed appears to have been in good repair. The fact that the sap surface of the tie had partially decayed is no indication that it was too unsound to support the weight of the trains. This is probably more or less the case with all wooden ties in a few months after they are laid down.

We cannot say as matter of law that it was the defendant's duty to furnish the plaintiff's intestate with a safe standing place when he alighted to couple or uncouple cars. In fact there was no necessity to alight at all, as the order given might as well have been executed by means of the brake-rod.

For the errors above indicated, the judgment is reversed and a new trial granted.

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HOUSTON AND TEXAS CENTRAL R. R. Co.

v.

MADDOX.

(*Advance Case, Texas. May 22, 1885.*)

The injury complained of occurred after the train on which plaintiff was engaged arrived at D. Plaintiff, a brakeman on the train, was ordered to couple certain cars on the side-track to be attached to and carried on by the train. The injury occurred from an attempt to use the links which he found in the drawheads of said cars. Upon the question of negligence of the defendant, or contributory negligence of plaintiff, the court correctly charged as follows: "The law imposes on the defendant the duty of furnishing to its employees machinery and appliances of all kinds, including links and pins, reasonably suitable and proper to enable such employees to perform the duties required of them, and also to use reasonable diligence to keep such machinery and appliances in such reasonable proper condition after they are furnished, and if plaintiff was injured by reason of a failure of defendant in

this respect, he would be entitled to recover, unless you believe from the evidence that it was a part of plaintiff's duty as brakeman to examine the link before undertaking to use it."

A successful party may remit such portion of the damages recovered, even upon the intimation of the intention of the court to grant new trial if such be not done, as will bring the amount within the proper limit, and thus cure the defect.

**APPEAL from Grayson County.**—March 7, 1882, appellee brought this suit against appellant, alleging that he was engaged in running on one of the appellant's cars as a brakeman, from Denison to Dallas, and that while in the act of coupling such cars at Dallas, his hand and fingers were caught and mashed, and three of his fingers rendered useless by reason of a bent link which was in the draw-head of the car, and with which he attempted to couple the cars, not knowing its condition; that it was bent in the middle, and slipped over the draw-head when he attempted to couple with it, and his hand was caught between the draw-heads and mashed, damaging him in the sum of \$15,000, which accident was caused through the negligence of appellant.

October 8, 1883, appellant filed an amended answer, pleading a general denial, and specially that plaintiff's own negligence and want of care in not inspecting and in not supplying a good link, as it was his duty to do, caused the injury complained of, and that appellant was without fault, and that the accident, if not caused by plaintiff's negligence, then it was occasioned through the negligence of a fellow-servant of plaintiff's; that appellant furnished good links, and that its trains were supplied with a sufficient number of extra links to supply the places of those that might become lost, bent or broken, and that it was appellee's especial duty to discover the defects in the link and to supply its place with a good one.

The case was tried by a jury, which resulted in a verdict and judgment in favor of plaintiff for \$4000.

Appellant filed a motion for new trial, pending which appellee entered a *remittitur* of \$1000, upon which the court overruled the motion.

The first assigned error is the action of the court in refusing to give the following instructions asked by the defendant, to wit:

"If you believe from the evidence that plaintiff was guilty of any negligence contributing to his injury, you will find for the defendant, and in determining the question of negligence you are instructed:

"1. That it is the duty of railroad companies to provide reasonable, suitable, and safe machinery and appliances with which the employee is to work.

"2. That the railroad company, after furnishing appliances, which are originally reasonably suitable and safe, it is not required to insure or warrent the continuance of that condition, but the em-

ployee who works with appliance is required to take notice of defects that are brought on by its use, and report the same to his employer, or supply the place by one not defective, if the employer has placed good ones in his reach for that purpose, and a failure to do this would be such negligence as to preclude a recovery for an injury received in the use of a defective appliance."

The second assigned error is the action of the court in giving the following special charge at request of plaintiff, to wit:

"The law imposes on the defendant the duty of furnishing to its employees machinery and appliances of all kinds, including links and pins reasonably suitable and proper to enable such employees to perform the duties required of them, and also to use reasonable diligence to keep such machinery and appliances in such reasonably proper condition after they are furnished, and if plaintiff was injured by reason of a failure of defendant in this respect, he would be entitled to recover unless you believe from the evidence that it was part of the plaintiff's duty as brakeman to examine the link before undertaking to use it."

The fourth error assigned relates to the excessiveness of the verdict, and the fifth assigned error is: "The court erred in allowing plaintiff to file a *remittitur* in this case, and in overruling defendant's motion for a new trial, based on the ground that the finding of the jury was excessive," because the measure of damages in this case not being a matter of law, and the court not being able to determine with certainty the amount of damages which the plaintiff was entitled to recover, the *remittitur* could not cure the excessive verdict and judgment.

*R. De Armond & C. N. Buckler* for appellant.

*Hare & Head* for appellee.

WALKER, P. J.—The court did not err in refusing to give the special instructions asked by the defendant. It was not applicable to the case. The evidence showed that the train had FACTS. reached Dallas, and that the plaintiff, a brakeman on it, was ordered to couple certain cars that were on the side-track, presumably to be attached to and carried on by the train. The injury complained of resulted from the attempt to make use of the links which be found attached to, or in the draw-head of the cars referred to, and if they were defective and dangerous to be used, the question is whether the defendant was guilty of negligence in not having supplied proper links for the occasion in question; and whether, notwithstanding such general obligation, it devolved as a duty on the plaintiff to have made such an examination of the link before using it as a man of ordinary care ought or would have made under the circumstances. The instruction asked was adapted to the case of the use by an employee of tools or appliances, the condition of which is the subject of his supervision and use, and the defects

occurring in or existing in which it is his duty to know, and of which he is supposed to be cognizant. This is not that case. *H. & T. O. R. R. v. McNamara*, 59 Texas, 255.

The charge given by the court presented the proper view of the subject under the facts proved on the trial, and the court did not err in giving it.

The charge given by the court presented the proper view of the subject under the facts proved on the trial, and the court did not err in giving it.

The question of negligence on the part of the defendant under all the facts was an issue to be determined by the jury, and their verdict is supported by evidence and that the plaintiff did not contribute to the accident by any want of care on his part. **NEGLIGENCE TO BE DETERMINED BY JURY.** Whilst it is true that there was much testimony introduced by the defendant to show that it was the duty of the brakeman to examine the link before attempting to use it, there was distinct and intelligent evidence to the contrary, and it was the province of the jury to weigh it all and determine the conflict according to their judgment upon it, which they did do. Their verdict is, therefore, not without evidence, but it is supported by sufficient evidence. As concerns the condition and fitness of the link for use with safety to the defendant's brakemen, there can be raised no controversy under the evidence.

There remains but one question, whether the verdict is so excessive in amount as to require a reversal of the judgment. The familiar rule of law applicable to cases like this is thus stated:

**WHETHER VERDICT EXCESSIVE.** "Where there is not a legal measure of damages, and where the damages are liquidated and the amount is referred to the discretion of the jury, the court will not ordinarily interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court, and the law does not recognize in the court the power to substitute its own judgment for that of the jury. Although the verdict may be considerably more or less than in the judgment of the court it ought to have been, still it will decline to interfere unless the amount is so great, or so small, as to indicate that the jury must have found their verdict under the influence of passion or prejudice, or, in other words, that it is the result of a perverted judgment and not that of their cool and impartial deliberation. When the verdict is thus excessive or deficient, the trial court in its discretion will interpose and set it aside." 1 Sutherland on Dam., p. 810.

Accepting this as the standard rule on the subject, we are unable to say from the record before us that the discretion of the trial court was improperly exercised in refusing to set aside the verdict. The plaintiff's injury was shown to be a permanent one, and which directly affected his capacity to earn a livelihood to a serious de-

gree; and that he had already sustained considerable pecuniary loss in consequence of the injury, as well as having been subjected to great pain, bodily and mentally. We know of no just rule to enable us to declare that the estimate of the jury of the plaintiff's damages were excessive even if he had not entered a *remittitur*, as was done.

It may be inferred that the trial court may have indicated an intention to grant a new trial unless the *remittitur* should be entered of \$1000. The fact that the plaintiff yielded to such a suggestion, if made, is no concession that can injuriously affect his *REMITTITUR* rights on this appeal. *Gulf, West Texas & P. R. R. v. Montier*, 61 Texas, 124. We perceive nothing in the amount found by the verdict, or otherwise disclosed by the record, which indicates that the jury were influenced by passion or prejudice, and if not, certainly, if the plaintiff saw proper to remit a part of his judgment, he had a right to do so without prejudice to the validity of it as it stood after being thus diminished.

In cases where it appears that an excessive verdict has resulted from the passion or prejudice of the jury, the effect of a *remittitur* to an amount satisfactory to the judgment of the court trying the case as not being excessive, has been held to remedy the objection. The correctness of such a practice, however, is questioned by Sutherland in his work on damages, as being a departure from sound principle and practice. 1 Sutherland on Dam., pp. 813, 814, and the cases there cited.

As already intimated, we do not think that such a question is here involved, however. We are of the opinion that the judgment ought to be affirmed.

**Affirmed.**

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## ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. R. Co.

v.

HIGGINS.

(44 *Arkansas Reports*, 298.)

When an answer does not contain a counter-claim or set-off, no reply is admissible. The filing of the answer puts the cause at issue, and the circuit judges should not permit the record to be incumbered with useless and improper pleadings.

An infant's release of a demand is voidable at his election; and the bringing of suit upon the demand is an unequivocal disaffirmance of the release.

An infant may disaffirm his contract without restoring the consideration received for it.

A railroad company in using in its trains an old car which is lower than

the others, is not guilty of such negligence, as to be liable to its servants who knowingly incur the risk, for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height.

SMITH, J.—A minor, suing by his next friend, brought this action against the railway company for personal injuries sustained in its service. The answer traversed the allegation of carelessness in the operation of defendant's road, and averred contributory negligence, denied the plaintiff's minority and pleaded that for the sum of \$125 paid to him, he had in writing released all right of action against the company. The plaintiff replied that he was a minor when he executed the release and was therefore not bound by it. Upon this issue the cause was tried and the jury gave a verdict for \$4000.

As the answer did not contain a set-off or counter-claim, no reply was admissible. When the answer was filed, the cause was at issue, and the circuit judges should not permit the record to be incumbered with useless and improper pleadings. Gantt's Dig. sec. 4579; *George v. St. L., I. M. & S. R. R. Co.*, 34 Ark. 613; s. c., 1 Am. & Eng. R. R. Cas. 294.

The testimony shows that the plaintiff was only about nineteen years of age at the time of his injury, although he appeared to be older; and the release relied upon bears date some four months later, consequently he was not bound by it, if he has signified his election to disaffirm it. And the bringing of suit is an unequivocal act of disaffirmance. *Watson v. Billings*, 38 Ark., 278; *Sims v. Everhardt*, 102 U. S., 300.

But it is suggested that the plaintiff could not repudiate his contract made in infancy without restoring the consideration he had received. This doctrine was intimated in *Bozeman v. Browning*, 31 Ark. 364; and it cannot be denied that it has respectable authority to support it. Yet it seems to be founded on a misconception of the ground upon which the right is founded, viz., the presumed incapacity of an infant to protect himself against the arts of designing persons and the consequence of his own indiscretion. To require of him, then, to take such care of the consideration received as will enable him to restore it and thereby place the other party in *statu quo*, is to measure his capacity by the same standard that is applied to adults.

"The right to repudiate is based on the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself; and where the avails of the property are improvidently spent, or lost by speculation or otherwise, during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether. . . . The right to re-

PLEADINGS: ANSWER: REPLY: ISSUE.

INFANT: RE-LEASE: AFFIRMANCE.

RETURN OF CONSIDERATION.

scind is a legal right established for the protection of the infant; and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle, we think a restoration of the consideration could not be exacted as a condition precedent to a rescission." *Green v. Green*, 69 N. Y. 553; *Chandler v. Simmons*, 97 Mass. 508; *Walsh v. Young*, 110 Ib. 396; *Gibson v. Slopher*, 72 Ib. 279; *Buchizky v. DeHaven*, 97 Pa. St. 202.

There is no doubt that the plaintiff suffered severe and permanent injuries such as to make of him a cripple and render the remainder of his life miserable. But can he recover of the railway company damages for those injuries?

The plaintiff's own deposition is wholly confined to the nature and extent of his injuries and his sufferings. He does not speak of the circumstances under which the accident took place, nor disclose any particulars from which it can be inferred whose fault it was. And the same may be said of all the other testimony in the case, except that of one witness, which is given entire:

"I know George Higgins; I was conductor of the train when he was hurt. George was a brakeman. As we were going north from Texarkana, on defendant's railway, about one and a half miles south of Homan, the door to one of the box cars dropped off and two bales of cotton fell out. I told the men to set that car out on side-track so that the cotton could be put back and brought on by the next train. George was brakeman on the rear end of the train (hind brakeman). He uncoupled the caboose from the train and left it standing on the main track just below the mouth of the switch. The box car was set out on the switch by a sudden kick back, and the train pulled back to couple on to the caboose. It was then George got hurt. He had to set the switch both ways. The caboose was a little old, and the floor had sagged a little; on this account the drawhead of the caboose was a little lower than that of the freight car, so that in coupling the drawheads would pass one over the other, unless the coupling was successfully made. They used a crooked link in coupling the caboose to the other cars. When the box car was set out, George left the crooked link in the rear end of the box car, and when the train pulled back on the main track to get the caboose there was a straight link on the rear end of the box car that was to be coupled to the caboose. Higgins attempted to make the coupling with the straight link, and was unsuccessful, whereupon the drawheads passed and locked, and caught Higgins and crushed him. I was about two car-lengths of him at the time, and when he called me I knew what was the matter. It was George's business to make the coupling. He had been advised of the condition by me, and I had always told him of it ever

since he was with me, and that I had a crooked link with which to make the coupling, and for him to never attempt to make the coupling without this crooked link. I had had charge of this car for about three months. I made complaint twice to the master mechanic, Mr. Finley, about its condition. He gave me no assurance that he would give me another caboose. George hadn't been very long on the road, say about two weeks. I don't know that he had not been on the road before. The crooked link was on the hind end of the car that was set out. Crooked links are made to be used when one drawhead is higher than the other. I suppose George was in a hurry, as we were hurried about this sudden emergency, and tried to make the coupling with the straight pin in the rear end of the box car that was backing down to be coupled to the caboose. The accident was about 6 o'clock in the morning, about twilight—it was dusty.

"I had two brakemen on the train, George acted as hind brakeman. He acted as such in all my employment of him, about two weeks. I had no other caboose except this all the time he was with me. It was his business to couple and recouple this car. I had told him to use a crooked link in making this coupling. He had made several couplings of this car. I would not have attempted to make this coupling myself, under any consideration, without a crooked link, but ninety-nine times out of one hundred the coupling could have been made with the crooked link. I took George to be from twenty to twenty-two years of age. He was the brightest of all his brothers. Two of his brothers, one older and one younger than himself, have been brakemen. He never told me how he got hurt. I told him he ought to have used the crooked link, and if he had he would not have been hurt. I am not in the employ of defendant now.

"When we make a switch it is the hind brakeman's duty to make the uncoupling, open the switch, close the switch, then recouple the caboose. My train was fully equipped, two brakemen and myself. I was running a through-freight. I think I had sufficient men to do the work. Two men can do all the work easily, except in case of emergency. Setting out this car was a case of emergency, but two men can do it. No extra pressure was put on Higgins because of no more men. When the switch was made the crooked link was left in the hind end of the box car set out. I was particular about keeping sufficient crooked links for this caboose, and there was one extra crooked link in the caboose when Higgins made the coupling at which he got hurt. As I told you before, I had always told him to use a crooked link when he made a coupling with the caboose. It was his duty to have taken the straight link out of the rear end of the box car which was to be coupled on to the caboose, and to get a crooked link before making the coupling. It is the



hind brakeman's duty to make all the coupling and uncouplings of the caboose, and to clean it up."

A master owes it to his servant to provide suitable means, material, machinery, and appliances to do his work. And this rule, in its application to the relations of a railway company to its train-hands, includes a safe track and sound and sufficient cars. Here the proximate cause of the injury was not the old and damaged condition of the caboose, but the attempt to make the coupling with a straight link, against the use of which he had been warned, instead of a crooked link which was furnished him for the purpose.

A railway company, in making use in its trains of an old car which is lower than the others, is not guilty of such negligence as to be liable to its servants, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height. *Ft. W., J. & S. R. R. Co. v. Gildersleeve*, 33 Mich. 134. And in *Hulett v. St. L., K. C. & N. R. R. Co.*, 67 Mo. 239, it was *held* that a brakeman who undertook to couple together two cars of unequal heights without using the ordinary crooked link, adopted for preventing accidents in such cases, was not entitled to recover for injuries so sustained.

The judgment is reversed and a new trial ordered.

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KELLY, Adm'r, etc.,

v.

WISCONSIN CENTRAL R. R. Co. *et al.*

(*Advance Case, Wisconsin. June 1, 1885.*)

A brakeman was killed while attempting to couple a freight car belonging to the road by which he was employed and a car belonging to another road, by reason, as alleged, of a dissimilarity in the couplings of the two cars. *Held*, that the railroad company was not liable.

APPEAL from circuit court, Fond du Lac county.

*A. A. Kelly and Duffy & McCrary* for appellant.

*Edwin H. Abbot and Howard Morris* for respondents.

ORTON, J.—This is an appeal from the order sustaining a general demurrer to the complaint, on the ground that it does not state a cause of action. The following facts are stated in the complaint: The intestate was, and had been for a long time, a brakeman on one of the freight trains of said company, which ran between Fond du Lac and Menasha, and it was his duty to couple

FACTS.

freight cars to the caboose. On the day the intestate lost his life, the train was run out on a side-track at Fond du Lac for the purpose of coupling a freight car which belonged to the Chicago, Milwaukee & St. Paul R. R. Co. to the caboose at the rear end of said train. The coupling iron of the freight car was too high and that of the caboose was too low for such coupling; and when the train moved up towards the caboose, the intestate stepped between the freight car and the caboose, and, in attempting to do such impossible coupling, the coupling-irons passed by each other over and under, and the intestate was caught between the platform of the caboose and the end of the freight car, and crushed and killed. The duty of the company to provide cars of suitable couplings and adapted to each other, and the negligence of the company in not doing so, and in allowing such a freight car of another company to be brought upon the track to be so coupled, and the care and prudence of the intestate, were alleged.

The want of adaptation of these two cars to each other (in all respects properly constructed in themselves) was the only defect, and the furnishing of them by the company and requiring them to be so coupled constituted the only negligence of the company complained of. There is no reason stated why the intestate did not or could not have discovered this apparent want of adaptation of the coupling-irons of the caboose and car. It was presumably in the daytime, as it is not stated that it was in the night. That the coupling-irons were so widely mismatched would seem to have been as observable and readily seen as the entire absence of coupling-irons, one or both. It is not to be inferred that this was the only instance where the cars of different roads, brought together to be coupled, were so mismatched. It might rather be inferred that not unfrequently they have coupling-irons higher or lower than each other, and that there is no reasonable assurance that they are always adapted to each other in this respect. This would seem to impose the duty upon the brakeman, before going between such cars and the caboose, or cars of the road on which he is employed, to couple them together, to observe more closely and to use more caution than if he was attempting to couple the cars of his own road, which are adapted to each other by construction or selection, in order to ascertain whether their coupling-irons would meet or pass each other. There is no allegation that he even looked to see, or that he could not have seen if he had looked, this clearly apparent difference in the elevation of these coupling-irons, or that his attention was diverted.

The difference in the elevation of the coupling-irons of this foreign car and the caboose or other cars of the defendant's road would not have been very easily or readily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this dif-

ference when consenting to take this foreign car into its train. When the car and the caboose were brought nearly together, this difference could have been at least much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference, and, if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangers his own life by not seeing, observing, or knowing of such difference in the elevation of the coupling-irons. Did not the intestate have the same, if not superior, means of knowing this difference, as or to that of the company? If the negligence of the intestate and that of the company, in this respect, are equally balanced, ought the plaintiff to recover? The duty of the company to know of this difference is not absolute, and it is not presumed to know of it as a matter of law.

In *Ballou v. Chicago, M. & St. P. R. R. Co.*, 54 Wis. 257; s. c., 5 Am. & Eng. R. R. Cas. 480, the company was not held chargeable with knowledge of latent defects in the ladder of a foreign freight car by which the intestate in that case lost his life. Mr. Justice Cassoday said in the opinion: "Certainly, a railroad company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would, in many instances, operate as a prohibition upon interstate commerce."

In *Smith v. Potter*, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140, a brakeman's arm was crushed by his attempting to couple two foreign cars in the night-time, the dead-wood of one of which had fallen down below that of the other, and they passed by each other. A verdict for the defendant was ordered and the judgment was affirmed. The case is very much in point. See, also, *Railway Co. v. Flanigan*, 77 Ill. 365; *Baldwin v. Railway Co.*, 50 Iowa, 680; s. c., 5 Am. & Eng. R. R. Cas. 408; *Hathaway v. Railroad Co.*, 51 Mich. 253; s. c., 12 Am. & Eng. R. R. Cas. 249; *Railroad Co. v. Smithson*, 45 Mich. 212; s. c., 1 Am. & Eng. R. R. Cas. 101.

The liability of the railway company in such cases does not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which its employees may work, but upon its knowledge, actual or presumed, that such coupling appliances will not properly fit and connect with each other. I have therefore briefly compared the means of knowing this unfitness of the coupling apparatus which the company and the intestate had, in order to see whether the greater negligence should be imputed to the company rather than to the intestate. It does not

appear from the complaint that the company had not in their employ at the time suitable persons to make inspection of all such foreign cars and ascertain their fitness to go into its trains, and it is presumed that such persons were so employed, and that other employees of the company caused the foreign car in this case to be upon the side-track ready to be coupled to the caboose. If, therefore, there was any negligence on the part of any one in not ascertaining beforehand that their couplings would not meet, it must have been the negligence of the co-employees and fellow-servants of the intestate, for which the company is not liable.

This case seems to be ruled in principle by the recent case of *Whitwam v. Railroad Co.*, 58 Wis. 408 ; s. c., 12 Am. & Eng. R. R. Cas. 214. In that case the draw-bar of the car was too short to be safely coupled to or detached from the engine, and the plaintiff, who was a brakeman, in attempting to detach the car from the engine, was injured. Mr. Justice Lyon said in the opinion: "It seems to us that the gravamen of this action was the coupling of the Green Bay car to the engine with the short draw-bar, and this is, really, the only negligence charged in the complaint. It does not appear when, where, or by whom this Green Bay car was attached to such engine; but the attaching of it, as well as the order detaching it therefrom, were manifestly the acts of the servants of the defendants, engaged in operating their railroads, and hence of the co-employees of the plaintiff, and therefore the defendants are not liable for the injury to the plaintiff resulting therefrom."

The case of *Railway Co. v. Black*, 88 Ill. 112, is perhaps more nearly in point both in facts and principle. In that case the complaint was that the coupling-bars of a flat car, loaded with iron, of one company and of a caboose of another company were of different heights, and the plaintiff, in stooping down between the cars to do the coupling, had his hand crushed between the bars. It is said, in the opinion by Mr. Justice Sheldon, that it was the plaintiff's own fault "in not ascertaining the condition of the cross-bars before attempting the coupling;" and that "from his experience as a switchman in the yard, and the frequent coming-in of cars thus constructed from other roads, he had reason to suppose that the case in question was liable to have a draw-bar in the situation it was here, and it was his plain duty to examine and ascertain, as he safely might have done, what was the condition of the car in this respect before venturing upon the coupling."

It seems to us plain enough that if there was any fault or negligence anywhere in this case, it was that of the intestate or his fellow-servants and co-employees, and the defendants are not liable. It is very sad and pitiful that so many deaths and severe personal injuries result from coupling cars; but this part of the employ-

ment of a brakeman is extremely dangerous and hazardous, and especially when it becomes necessary to couple together cars coming from different roads with dissimilar coupling appliances; and the care necessary to be used increases in proportion to such danger, and the law exacts its exercise, or it will refuse redress.

The demurrer was properly sustained. The order of the circuit court sustaining the demurrer to the complaint is affirmed, and the cause remanded for further proceedings according to law.

ATCHISON, TOPEKA AND SANTA FE R. R. Co.

v.

WAGNER.

(*Advance Case, Kansas. June 4, 1885.*)

A brakeman upon a railroad train was attempting to couple a car and engine. Owing to a defect in the coupling-pin, he was unable to withdraw it in time. The draw-bar, which had a defective spring, in consequence slipped past the draw-head, struck and injured him. He knew of the defect in the coupling-pin; but it was not shown that any of the officers of the railroad company knew of such defect. Neither party was shown to have any knowledge of the defect in the draw-bar.

*Held*, that the party had assumed all risk of his employment, and was not entitled to damages from the company.

ERROR from Reno county.

*A. A. Hurd, John Reid, W. C. Campbell and Robert Dunlap* for plaintiff in error.

*Whiteside & Hutchinson* for defendant in error.

VALENTINE, J.—This was an action brought by Robert Wagner against the Atchison, Topeka & Santa Fe R. R. Co. for damages for personal injuries alleged to have resulted from the negligence of the defendant. The case was tried before the court and a jury, and judgment was rendered in favor of the plaintiff and against the defendant for \$2000 and costs of suit, and from this judgment the defendant, by petition in error, appeals to this court. It appears from the record brought to this court that on December 23, 1881, and prior thereto, Wagner was in FACTS. the employment of the railroad company as a yard switchman at Nickerson, Kansas. His duties as switchman required him to couple and uncouple cars, make up trains, etc. Nickerson being the end of a division of the defendant's railroad, it was customary at that place to take off a car or coach from the western-bound

passenger train, which arrived at that place each evening, and to put it on the eastern-bound passenger train the next morning. A switch-engine was used for this purpose, and among the duties performed by Wagner were to couple and uncouple the passenger coach to and from this engine. The passenger coaches were equipped with a kind of draw-bar usually known as "the Miller coupling,"—an invention by which coaches are coupled to each other automatically, without the use of links or pins. Links or pins, however, may be used in coupling rolling stock equipped with this kind of coupling, and are so used whenever a coach equipped with this kind of coupling is coupled to another coach or car or engine not so equipped. The switch-engine was equipped with an oval-faced draw-head, with two or three slots or shelves, into which a link might be placed for coupling. One witness testified that this contrivance for coupling was called a "Hinckley switch-engine draw-head." In coupling or uncoupling coaches equipped with the Miller coupling to an engine equipped as this engine was, it was necessary to use a link and pins.

On the morning of December 23, 1881, Wagner was ordered by J. W. Reed, the yard-master, to get on the switch-engine, which had already been coupled to the passenger coach and was standing on the side-track, and to place the passenger coach in the eastern-bound passenger train. Wagner got on the step or platform of the engine, and between the engine and the coach, for the purpose of obeying this order. The engine and coach were then moved by the engineer in obedience to a signal from Wagner, and when they arrived at the proper place Wagner endeavored to uncouple the engine from the passenger coach, and in doing so he attempted first to pull the pin from the draw-head of the engine, but finding that the head of the pin was broken and the pin difficult of removal, he then reached over to the draw-bar of the passenger coach and pulled that pin. The engine at the time was pushing against the coach, and the draw-bar of the coach slipped by the draw-head of the engine, and, catching the plaintiff's leg, broke it about two or three inches above the knee. This incapacitated him for work for a long time, and he endured pain and incurred expense, but his leg finally got to be nearly as well and sound as before the accident.

No negligence is imputed to the yard-master or to the engineer, and it is not claimed that the engine or the passenger coach was in any manner defective or out of order, except the defects in the coupling-pins, of which the plaintiff had full and complete knowledge, and the spring or appurtenances connected with the draw-bar of the passenger coach, of which the plaintiff did not have any notice or knowledge. Indeed, no person is shown to have had any notice or knowledge of any defect in such draw-bar, or in anything connected therewith; and it is certainly, at least, very doubtful

whether there was in fact any such defect. The jury, however, upon very weak evidence, found that there was such a defect; and for the purposes of this case we shall assume that there was.

The question then arises, is the defendant liable because of such defect, and upon the other facts of this case? We think not. It must be remembered that the question in this case does not arise between the railroad company and a passenger; or between the railroad company and some third person having no connection or contract relation with the railroad company; but it arises between the railroad company and one of its employees, who, by reason of his employment, has assumed all the ordinary risks and hazards incident to his employment. A passenger pays to be protected from all the risks and hazards incident to the operation of a railroad, from which the railroad company can, by the highest degree of skill and care, protect him; while an employee of the railroad company is paid to assume all the risks and hazards incident to his employment; and a third person having no connection or contract relation with the railroad company stands upon his original legal rights, being neither protected by the railroad company nor assuming any of the dangers, risks, or hazards incident to the operation of the railroad; and while such third person may not be placed in the same highly favorable situation with regard to dangers, risks, and hazards as a passenger is, yet he is placed in a much more favorable situation than a mere employee of the railroad company who is paid to take the risks and hazards of his employment. Hence differences in the rules governing these various relations must be expected.

DISTINCTION BETWEEN RIGHTS AND RISKS OF PASSENGER AND EMPLOYEE.

Mr. Thompson, in his work on Negligence, uses the following language:

"In an action by an employee against his employer for injuries sustained by the former, in the course of his employment, from defective appliances, the presumption is that the appliances were not defective; and when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this fact, and was not negligently ignorant of it." Page 1053, § 48.

Mr. Wood, in his work on Master and Servant, uses the following language:

"The servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part. And he is met by two presumptions, both of which he must overcome in order to entitle him to a recovery: First, that the master has discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition; and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery: it imposes upon him the burden of showing that

the master had notice of the defect, or that, in the exercise of that ordinary care which he is bound to observe, he would have known it. When this is established, he is met by another presumption, the force of which must be overcome by him, and that is that he assumed all the usual and ordinary hazards of the business," etc. Section 382.

Shearman & Redfield, in their work on Negligence, use the following language :

"In actions brought by servants against their masters, the burden of proof as to the masters' knowledge or culpability in lacking knowledge of the defect which led to the injury, whether in the character of a fellow-servant or in the quality of materials used, rests upon the plaintiff." Section 99.

Mr. Pierce, in his work on Railroads, uses the following language :

"The company's knowledge of a defect must be proved in order to make it liable for the consequences ; but such knowledge may be shown by circumstances ; as the length of time it existed before the injury, or by a notice given to an employee who had an express or implied authority to receive it. The fact that the servant complained of a defect in the road or its appointment is admissible in proof of the company's knowledge." Page 373. "The burden of proof is on the servant to show that the company was negligent, and that his own negligence did not contribute to the injury ; and, where the injury was caused by defects in the road or its appointments, that the company knew or ought to have known them, or negligently employed incompetent persons to construct or repair them ; and where it is alleged to have been caused by the incompetency of fellow-servants, that the servant was incompetent, and the company knew or ought to have known of such incompetency ; and he must show that he did not himself, before the injury, know of such defects or incompetency. The company's negligence is not to be inferred from the fact of injury by a collision of trains, or by an explosion of engines, even in jurisdictions where negligence is implied from the collision or explosion in case of injuries to passengers or third persons." Page 382.

The supreme court of Iowa, in a recent decision, uses the following language :

"As to driving in the draw-bar, there is no evidence whatever that any of the officers of the defendant had any knowledge that the draw-bar was in any way defective, or that it was defective in its original construction. Without some evidence on this question there could be no recovery for that defect, if there was any defect." *Skellenger v. Chicago & N. W. R. R. Co.*, 61 Iowa, 714, 715 ; s. c., 17 N. W. Rep. 151 ; s. c., 12 Am. & Eng. R. R. Cas. 206, 207.

There are a vast number of other cases announcing the same principles and sustaining the elementary works above cited, so far as we wish to apply them to this case, among which are the follow-



ing: *De Graff v. New York Cent. & H. R. R. Co.*, 76 N. Y. 125; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Elliott v. St. Louis & I. M. R. R. Co.*, 67 Mo. 272; *Mobile & O. R. R. Co. v. Thomas*, 42 Ala. 672; *Columbus, C. & I. C. R. R. Co. v. Troesch*, 68 Ill. 545; *Chicago & A. R. R. Co. v. Platt*, 89 Ill. 141; *Indianapolis, B. & W. R. R. Co. v. Toy*, 91 Ill. 474; *East St. Louis, P. & P. Co. v. Hightower*, 92 Ill. 139; *Wonder v. Burlington & O. R. R. Co.* 32 Md. 411; *Ballou v. Chicago, M. & St. P. R. R. Co.*, 54 Wis. 257; s. c., 5 Am. & Eng. R. R. Cas. 480, and note, 504; *Smith v. Chicago, M. & St. P. R. R. Co.*, 42 Wis. 520; *Flannagan v. Chicago & N. W. R. R. Co.*, 50 Wis. 462; s. c., 2 Am. & Eng. R. R. Cas. 150; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Columbus & I. C. R. R. Co. v. Arnold*, 31 Ind. 174; *Missouri Pac. R. R. Co. v. Lyde*, 57 Tex. 505; s. c., 11 Am. & Eng. R. R. Cas. 188.

We think the following principles are deducible from the foregoing authorities, and are sound law: (1) An employee of a railroad company by virtue of his employment assumes all the ordinary and usual risks and hazards incident to his employment. (2) As between a railroad company and its employees, the railroad company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities for the operation of its railroad. (3) As between a railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its railroad. (4) It will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty. (5) And where an employee seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not devolve upon such employee to prove such insufficiency; but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that, by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice. (6) And proof of a single defective or imperfect operation of any of such machinery or instrumentalities, resulting in injury, will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection, or insufficiency in such machinery or instrumentalities. (7) As between a railroad company and its employees, the railroad company is not necessarily negligent in the use of defective machinery not obviously defective, but it is negligent in such cases only where it has notice of the defects, or where it has

PRINCIPLES OF  
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TO RAILWAY EM-  
PLOYEES.

failed to exercise reasonable and ordinary diligence in discovering them and in remedying them.

The decisions in this State are, so far as they go, in consonance with the decisions elsewhere. *Kelly v. Detroit Bridge Works*, 17 Kan. 558, 562; *Missouri Pac. R. R. Co. v. Haley*, 25 Kan. 35, 56, 62, 63; *Atchison, T. & S. F. R. R. Co. v. Holt*, 29 Kan. 149; *Jackson v. Kansas City, L. & S. K. R. R. Co.*, 31 Kan. 761; s. c. 15 Am. & Eng. R. R. Cas. 178.

In the present case, as no negligence is imputed to the railroad company except in using a passenger coach with a draw-bar connected with a defective spring, or with some other defective appliance, and as it is not shown that the railroad company, or any of its employees, or, indeed, any other person, had any knowledge or notice of such defect prior to the occurrence of the accident upon which the plaintiff's action is founded.

NO NEGLIGENCE BY COMPANY IN THIS CASE. it cannot be said that any negligence whatever upon the part of the railroad company has been shown, and the verdict and judgment in the court below should have been rendered in favor of the railroad company; but they were not, but, on the contrary, both were rendered against the railroad company. After the verdict was rendered the defendant moved the court to set it aside and for a new trial, upon various grounds, among which were the grounds that the verdict was not sustained by sufficient evidence, and was contrary to law; but the court overruled the motion, and rendered the judgment aforesaid. Of course, by this ruling the court approved the verdict of the jury; but as the verdict and judgment are not sustained by sufficient evidence, although approved by the trial court, it becomes the duty of this court to set them aside and grant a new trial. It has frequently been held in this court that whenever the verdict of a jury, or any necessary and material fact involved in the verdict, is not sustained by the evidence, or by any sufficient evidence, the supreme court will set it aside and grant a new trial, although the verdict may have been approved by the trial court. *Backus v. Clark*, 1 Kan. 304; *Ermul v. Kullok*, 3 Kan. 499; *Howe v. Lincoln*, 23 Kan. 468; *Irwin v. Thompson*, 27 Kan. 643; *Union Pac. R. R. Co. v. Dyche*, 28 Kan. 200, 206; s. c., 11 Am. & Eng. R. R. Cas. 427; *Johnson v. Burns*, 29 Kan. 81, 86; *Reynolds v. Fleming*, 30 Kan. 106; *Babcock v. Dieter*, 30 Kan. 172.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the justices concurring.

**Injury to Employee. Patent Defect in Machinery. Negligence.**—A brakeman upon a railroad train was crushed while coupling cars. The accident was caused by reason of the fact that the draw-bar of one car was lower than that of the other car. Ordinarily there was no difference in the height of draw-bars on defendant's cars, but the draw-bar of the car in question was five or six inches lower than the usual height. This fact had been observed by

defendant's inspector and the car reported for repairs. On the trial the court directed a verdict for defendant.

*Held*, that the court below did not err in so instructing the jury. The court say: "It is very evident that the defendant was not in the exercise of the highest care when making use of this car in its business. But the car is hardly to be considered dangerous machinery, in the sense that a defective engine is, or a car with a weakness in some part, which in its ordinary use may result in a breaking down, and put property and persons being transported in peril. This car, for anything that appears, was in perfect running order, and might safely have been run for an indefinite period. The objection to its being run was that in coupling it to other cars more care was required than if one end were not so low; but with care it could be coupled safely, and had been so coupled regularly from day to day, and sometimes by the plaintiff himself. The danger, such as there was, would arise mainly from thoughtlessness; but attention would be kept alive, and in a measure compelled, by the fact that defendant was receiving cars from other roads not corresponding in height with its own, so that it would be necessary for brakemen at all times to take notice of the relative heights when about to make a coupling.

"But it is insisted for the plaintiff that he had a right to assume, when coupling cars belonging to the defendant, that they were all of the same height. And when it is replied that as regards this car the plaintiff well knew it was at one end lower than the other cars, the response is that the car having been reported for repairs, the plaintiff had a right to assume that defendant had performed its duty and repaired the car before bringing it again into use. But what is unquestionable in this case is that the trouble with the car was such that plaintiff could not possibly have failed to observe it, had he made use of his eyesight at the time. Five or six inches difference in the height of draw-beams to cars is very considerable; and one would think that if a car was that much below the average its lowness must be noticed, even if it stood alone. But it must necessarily be noticed when the cars come together, if the brakeman directs his attention to the point of meeting. In this case the plaintiff was not thus directing his attention; he was standing with his back to the cars as they came down, and his eyes, for any use they were to him for the purposes of protection, might as well have been closed. It seems plain that if defendant was wanting in due care in continuing the use of the car on its line, plaintiff was at least equally wanting in care in thus exposing himself to a risk against which the ordinary use of his eyesight would have protected him."

Sherwood, J., dissented on the ground that the alleged negligence of the defendant in not ascertaining or knowing of the defective machinery or cars was a question that should have been submitted to the jury. *Brewer v. Flint & Pere Marquette R. R. Co.*,\* Michigan, May 13, 1885.

**Facts of Injury in Coupling Cars.**—In an action by a servant against a railroad company for injuries sustained by reason of the breaking of certain car-couplings and the consequent falling of the cars upon the plaintiff's foot, it appeared that the defect in the couplings was known to the superintendent and that it was not known to plaintiff, nor was it any part of plaintiff's duty to have such knowledge. *Held*, that the evidence was sufficient to entitle plaintiff to recover. *Bowers v. Union Pac. R. R. Co.*,\* Utah, January, 1885.

**Injury to Employee by reason of Defective Draw-bar.—Knowledge of Employee.**—The plaintiff, who was brakeman upon a railroad train, was injured while attempting to couple a baggage-car equipped with a "Miller coupler" to the tender of an engine equipped with an ordinary coupler. The latter was not provided with wooden buffers to prevent the car and tender from colliding, as they sometimes do in such case. In the present instance they did so collide. Plaintiff had been for some time employed in the service of the company.

*Held*, that whether or not plaintiff had notice of the danger involved in making the coupling was a question for the jury. The court said: "Now, in this case, plaintiff undoubtedly knew the character of these two couplers. He knew that one was a Miller and the other a common one. He also knew that the former had a certain amount of lateral motion; also that there was no goose-neck or wooden buffers on the tender. But conceding this, and assuming that he must be held to the ordinary skill and experience of brakemen, it does not appear, certainly not conclusively, that he, by the exercise of ordinary observation, ought to have understood the risks to which he was exposed by using such couplers. He was not bound to be an experienced machinist or car-builder. It does not appear that he knew, or by the exercise of ordinary observation ought to have known, that the lateral motion of the Miller coupler was sufficient to permit it to slip past the end of the draw-head on the tender. It does not appear that the use of these two kinds of couplers together in this way was usual or common, so that brakemen generally would or should understand fully the dangers incident to such a practice. Indeed, from the evidence, it is to be presumed that prudent railroad companies do not ordinarily adopt any such practice. Plaintiff had been using them on this train for some time, and it does not appear that he had ever seen the two couplers slip past each other before,—a fact which distinguishes this case from Toledo, etc., R. R. Co. v. Asbury, 84 Ill. 429, cited by defendant. Neither does it appear that such a thing would be likely to occur except under peculiar circumstances; as, for example, where, as in this case, the coupling was being made on a curve. As remarked by the court below, the convexity of the draw-head on the tender being so slight, and the lateral motion of the Miller coupler being resisted by a spring, we cannot say that it was obvious or apparent that they would be likely to slip past each other if they came together as they ordinarily would on a straight track. The matter was properly for the jury." *Russell v. Minneapolis & St. Louis R. R. Co.*, \* 32 Minnesota Reports, 230.

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## HENRY

v.

## SIOUX CITY AND PACIFIC R. R. Co.

(*Advance Case, Iowa. April 23, 1885.*)

A brakeman upon a railroad train was injured while coupling cars kicked back to others standing on the track. In a suit by him against the company he proved that he was expressly ordered by the conductor to do the work.

*Held*, that it was error to permit him to prove that it was usual for the company to couple its cars by having them kicked back as above.

The plaintiff was not entitled to put in evidence certain regulations of the company as to "cars and switching on grades," when it appeared that the track was level at the place of the accident.

The plaintiff was entitled to show in the above case what the practice of the company was in the making of such couplings, in order to show that he was justified in the belief that the car kicked back would have its speed moderated in time to prevent injury to him and thus escape the imputation of contributory negligence. It is not necessary for a party to plead the rules or usages of a railroad company to entitle him to put the same in evidence.

The court will not ordinarily reverse because of the admission of leading questions by counsel to witnesses in the trial court. This is generally a matter within the discretion of the trial court. But sometimes when a party to the action is called and his own counsel are permitted to ask him leading and instructive questions, persistently, as to the vital points of the case, the court will reverse on that ground.

The question of negligence and contributory negligence in the above case was clearly for the jury.

APPEAL from Cherokee district court.

This is an action for damages for a personal injury received by the plaintiff while engaged as a brakeman in coupling cars upon defendant's road. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

*Joy, Wright & Hudson* for appellant.

*E. F. Gray* and *E. C. Herrick* for appellee.

ROTHROCK, J.—1. The plaintiff was engaged as a brakeman upon defendant's road upon the run from Missouri Valley to the Missouri River. The trainmen on that run consisted of a con- FACTS ductor, engineer, fireman, and one brakeman. On the twenty-second day of May, 1882, the run was being made from the river to Missouri Valley with a train of about 30 freight cars. When the train arrived at California Junction, a station on the line, orders were received to leave two empty stock cars at that station. Some switching was necessary to set out the stock cars, and put them in the proper position on the side-track. Some cars were already standing on the side-track and they were moved. When the cars had been properly shifted on the tracks, there were five cars attached to the engine which were "kicked" or thrown back upon the side-track. After they were thrown off from the engine and while they were in motion the plaintiff climbed upon the last car of the five, and ran along the top of the cars and descended the ladder by the forward car, and alighted upon the ground when it was within a car and a half or two car lengths from the car standing on the side-track, and ran forward and made the coupling. The cars came together with such force that plaintiff was thrown down, and one of his ankles was seriously injured by one of the car-wheels.

The plaintiff claimed in his petition that he received the injury by reason of the negligence of the defendant, its agents and servants, and without any negligence on his part. The negligence complained of in the petition was—First, failure to employ an adequate number of brakemen on the train to operate the same with safety; second, in the employment of an incompetent engineer; third, in the conductor's ordering plaintiff to couple the cars when thrown or kicked back to other cars standing on the side-track, and the failure of the conductor to ride the moving cars back to be coupled, and check their speed with the brakes, to enable plaintiff to make the coupling with safety; fourth, that the engineer threw or kicked back the cars with unusual violence.

The court, as we think, correctly charged the jury that there was no evidence that the engineer was incompetent, and that there was no evidence to charge the defendant with negligence in failing to furnish a sufficient number of brakemen on the train. The cause then

depended upon the two questions: whether there was negligence on the part of the engineer in sending the cars back with unusual violence; or whether the conductor was negligent in requiring the plaintiff to make the coupling, and failing to protect and shield him from injury by following him upon the cars and checking their speed by the use of the brakes.

The plaintiff claimed in his petition, and testified as a witness, that the conductor expressly ordered him to make the coupling. He did not rely upon the fact that, aside from the order, it was his duty to couple cars which were left upon a switch. The court permitted the plaintiff to introduce evidence to the effect that it was the usual mode of performing the required act to couple the cars left standing on the side-track. This evidence was objected to, and an exception was taken to the ruling of the court in admitting it. We think it should have been excluded. It did not tend to corroborate the claim of the plaintiff that he was expressly directed by the conductor to make the coupling, and it could have been introduced for no other purpose. If the plaintiff was directed to make the coupling by his superior in authority, this was warrant enough to authorize the act, and his claim that he was acting in the line of his duty would have been fully sustained without the proof of any usage pertaining to the matter. We cannot hold that the admission of this evidence was without prejudice, because the evidence as to the usage and as to the express direction is in conflict.

2. The plaintiff was also permitted to introduce certain rules adopted by the company pertaining to the duty of trainmen in the movement of cars. One of these rules was numbered **INTRODUCTION OF RULES IN EVIDENCE.** 44. It had reference to "cars and switching on grades." The introduction of this rule was objected to by the defendant, and the objection overruled. We think the rule should not have been allowed to be introduced as evidence. There was no grade in the tracks at California Junction, and the rule, therefore, establishes no line of duty applicable to the controversy in this action. We need not repeat the rule. It is sufficient to say that if its provisions should be held to apply to a level track, they were most important considerations in the determination of the case.

3. The plaintiff was allowed to introduce evidence over the defendant's objection that the proper manner of making the coupling required the conductor, when there was but one brakeman, to climb upon the cars and hold them up by the use of the brakes so that the coupling could be made with safety. We think this evidence was competent and proper, in view of the facts in this case. The plaintiff claimed that he stood near the conductor when he was ordered to make the coupling, and that as he ascended the ladder on the car the conductor started to follow him, and that he supposed, up until the time the coupling was

**EVIDENCE—MANNER OF MAKING COUPLING.**

made, that the conductor was on the cars and would check their speed. It is not claimed that the conductor told the plaintiff that he would follow him upon the cars. It was therefore perfectly competent to show that by the previous methods of making couplings under the same circumstances the plaintiff had reasonable grounds to believe that the conductor would check the speed of the cars.

It is proper to say here, in view of a new trial, that the claim made by counsel for defendant, that it is necessary to plead rules of the company or any usage as to the manner of the performance of duty in order to authorize their introduction in evidence, cannot be sustained. These rules and usages are mere evidence bearing upon the question of negligence of the defendant or its employees and the care and diligence of the plaintiff. And here we may say that the law as to custom, in its legal sense, has nothing to do with such questions as whether, when cars are left upon a side-track, they should be coupled together. It is not a question of custom; it is merely a question as to how or in what manner a given act should be done, or what is proper to be done in accomplishing it.

4. A number of objections were made by the defendant to leading questions propounded to the plaintiff and other witnesses. The objections were overruled. These questions ought not to have been propounded. Some of them were so grossly leading as to plainly indicate to the witnesses the answer that was desired. We incline to think that if this were the only error in this case, we would feel compelled to reverse the judgment LEADING QUESTIONS. for this reason. The overruling of an objection to leading questions, and, upon an inquiry not vital to the case, is not ground for reversal. Much is due to the discretion of the trial court. But when counsel put a party to the action upon the stand as a witness, and persist in leading and instructing him upon the vital points in the case by questions which are plainly improper, there must be some means resorted to by the courts to prevent it. When such a question is asked, an objection by opposing counsel, even if sustained by the trial court, does not prevent the mischief. Whatever injury or prejudice there may be to the opposite party is accomplished by asking the question.

5. We do not discover that the instructions given by the court to the jury are objectionable. Upon its legitimate facts the case is a very plain one. The plaintiff claims that the cars were thrown back with unusual violence, and that up to the time he descended to the ground to make the coupling they were running at double the proper rate of speed. It would have been palpable negligence on his part to make the coupling, knowing this fact. But he claims he had good reason to believe that the conductor was on the cars and would check the speed thereof. Now, it was a question for the jury, and about the only real question in the case, to determine from the evidence whether SPEED OF CARS—COUPLING.

the plaintiff had good reason for what he claims his belief was. If the plaintiff knew when he made the coupling that the speed had not been reduced, he cannot recover. If he did not know this, but supposed, and from all the facts and circumstances had reason to believe, that the conductor had brought the cars down to proper speed, and the conductor was negligent in not doing so, then he can maintain his action. The violence with which the engineer threw back the cars cuts no figure in the case, because the plaintiff admits that they were running at too high a rate of speed while he was on the top of them, and that he knew it. Unless he had reason to believe the speed would be checked, it was his own folly to attempt to make the coupling.

We have said this much about the real merits of this case because it is but one of many cases of this class which have come to us made up on a record which shows that counsel urge and insist upon the introduction of improper evidence, and that which is palpably immaterial, and not necessary to the maintenance of the action. It is not at all surprising that the trial court should err in some of the rulings in such cases. The ruling is required to be made at once, in the hurry of the trial, and without much time for reflection. It would be far better practice if counsel would refrain from attempting to crowd and push into these cases all the immaterial and improper evidence within their reach which the court will permit. Cases should be presented in the trial court with some regard to the contingency that they may be appealed to this court. *Reversed.*

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KLANOWSKI

v.

GRAND TRUNK RY. CO. OF CANADA.

(*Advance Case, Michigan. September 29, 1885.*)

The plaintiff's intestate was killed by a passenger train while crossing the defendant's track in his wagon. One of the questions in dispute was whether the engineer had sounded the whistle and rung the bell before reaching the street crossing where intestate was killed. Five train employees testified positively that these signals had been duly given, and nine witnesses for plaintiff testified as positively that they had not. Several of these witnesses were related to intestate. *Held*, that the trial court properly refused to direct a verdict for the defendant; that the question of credibility of the witnesses as to the facts in dispute was properly left to the jury.

Testimony that witness did not hear bell rung or whistle sounded is weak; but positive testimony that the bell was not rung and that the whistle was not sounded stands on a different basis, and is not to be discarded or overlooked.

When an accident is caused by an omission of a statutory duty a recovery is not precluded by contributory negligence unless gross.

Whether running train at an exceptionally high rate of speed is negligent is generally a question of fact. But *semble* it may amount to negligence *per se*.

*Held*, facts in case did not show contributory negligence.



ERROR to Wayne.

*Griffin & Warner* for plaintiff.

*E. W. Meddaugh* for appellant.

SHERWOOD, J.—Otto Klanowski, on the twenty-third day of June, 1883, lived with his family, consisting of himself, his wife, and four children, upon six acres of land, situated on Chene Street, near the city of Detroit, and about a mile from where the same crosses the Grand Trunk R. R. He was a teamster owning a team and wagon, and on that day had been ploughing for a neighbor by the name of Miller, who lived upon what was called the "Miller road," which runs east of Chene Street, and across the railway track diagonally about 24 rods northeast of the Chene-street crossing. This was known as the "Miller crossing." Still further northeast, about three quarters of a mile on the line FACTS. of the railway, is what is known as "Biglow's crossing," on Court Street. On the evening of the twenty-third of June aforesaid, between 9 and 10 o'clock, Klanowski started to go home from his work at Miller's with his team and wagon, having his son, Emil, with him, a lad about 15 years old, and who drove the team. In making the crossing upon the Miller road, they were overtaken by the Montreal express, consisting of three coaches, a baggage-car, and the engine, which came down upon them from the northeast at the rate of 40 miles an hour, the engine striking the wagon just as it was about to leave the track, and completely demolishing it, killing Mr. Klanowski almost instantly, greatly injuring the son, breaking his thigh and shoulder, and killing one of the horses. On the seventh day of August following, the plaintiff, who was the wife of the deceased, was duly appointed administratrix of his estate, and, on the nineteenth of September thereafter, brought this suit to recover for the injury and damages she and her children had sustained by the alleged negligent act of the defendant in killing her husband and destroying his property. No question arises upon the pleadings.

The case has been twice tried in the Wayne circuit court, and the plaintiff obtained a verdict upon each trial, which in the first was set aside in the circuit court, and the proceedings upon the second trial are now before us for review, brought up by writ of error, the record showing a bill of exceptions containing the substance of all the testimony taken upon the trial. Thirty-four assignments of error are presented for our consideration. When the plaintiff rested her case, counsel for defendant asked the court to direct the jury to render a verdict for defendant on the ground that the deceased contributed to the injury, and at the close of the trial requested the court to charge the jury "that, under the testimony in this case, the plaintiff is not entitled to recover, and the verdict of the jury should be for the defendant." The court de-

clined in each case to give the instruction asked, and exceptions were duly taken. These exceptions are properly first to be considered, because, if these rulings of the court were wrong, it is unnecessary to give attention to the other errors claimed. A view of the premises where the collision occurred and the deceased was killed was taken by the jury under the direction of the court.

There are certain statutory duties required to be observed and performed by a railway company in this State, intended to prevent injury and accidents to persons and property at railway crossings and other places of danger. These requirements are made for the benefit of passengers, strangers, and travellers on the highway (Evans *v. Atlantic, etc., R. R. Co.*, 62 Mo. 49), and such duties cannot be neglected or omitted with impunity. If they are, and an injury to persons or property occurs by reason thereof at such places, the company will be liable, and, although the party injured under such circumstances, by his acts, or omissions to act, induced by the negligence of the company, maybe guilty of some faults which contributed to the injury complained of, such fault ought not to be permitted to avail the company in making defence against their wrongful acts, unless it was wilful or so gross as to render it equally inexcusable. Any other rule would allow the company to take advantage of its own wrong in avoiding its statutory liability

In approaching a crossing upon a highway the circumstances differ in almost every case. Sometimes they are favorable to making an early discovery of the train, and many times not; sometimes the team requires more attention than at others; in some cases the approach to the track is up and at others down; some persons have quicker sight than others and can see at far greater distances; at some crossings the train moves on an up-grade and at others on a down-grade, the roadbed often being elevated and not unfrequently depressed below the surface of the highway, and in most cases the view is more or less obstructed by fences, bushes, shrubbery, or embankments. Many times the train runs much stiller than at others, in consequence of the conditions of the atmosphere and other causes; in all cases persons, except those in charge of the train, are liable to be deceived in the speed of the train, and in no case is the exact time when the engine reaches the crossing known to others than the engineer. For these and many other reasons which might be given, no other safe rule can be adopted. No less than the giving of every warning the law exacts should be held sufficient to shield the company from liability for damages arising from injuries received at such places. Safety to the lives of those travelling upon the cars, as well as to those travelling in vehicles upon the highway, requires this. All persons have a right to expect and rely upon the full performance by the company of all the requirements and duties imposed upon it by the law under

which it alone is allowed to exist and do business, and it is not unfrequently impossible to ascertain with any degree of certainty how far the neglect of the company to give the required warning at highway crossings may have been relied upon by a person in regulating and determining his action in approaching the track where a collision and injury occur resulting in his immediate death. Usually the circumstances surrounding the accident have to be relied upon in determining the question, and such action on the part of the injured party should never, in this class of cases, be allowed to control the verdict of jurors unless it satisfactorily appears to have been very gross, or wantonly negligent and careless. It was the duty of the defendant in this case, under the statute, to twice sharply sound the whistle of the locomotive at least 40 rods before reaching the crossing, and to ring continuously the bell for the entire distance.

These are very important and significant warnings. It is claimed upon the part of the plaintiff that these signals of the approaching train were not given; and if there is testimony in the case tending to show the claim was true, it was certainly the duty of the court to submit the case to the jury upon that point. On the part of the defendant, the conductor, engineer, fireman, brakeman, and another employee of the company who was a passenger upon the train, all gave testimony that the statutory signals were given. On the part of the plaintiff were sworn the son of the de- TESTIMONY AS TO A NEGATIVE FACT. ceased, who was in the wagon and driving the team at the time the injury occurred; Mr. Alstadt, who was sitting by the side of the track about 20 rods from the Miller road, and heard the crash; Mr. Moebly, who was within a short distance of the train and heard it coming; Mr. Harris, who was with Moebly and first saw the train at the Biglow crossing, and saw it when it crossed the Miller road; Mr. Schmidt, who lived on Chene Street, near the railway crossing, and about 200 paces from the Miller crossing, and heard the crash, and heard the train a short time before; Mrs. Schmidt, who was in her kitchen-door and heard the crash; George Strickle, who was in the wagon with Mr. Moebly when the train passed near the Miller house, and heard it; Kate Strickle, who was in the wagon with Mr. Moebly at the time the train passed; and Maggie Moebly, who was also in the vicinity of the accident when the train passed. All these witnesses were between the whistle post and the Chene-street crossing, or very near, when the accident occurred, and within hearing distance of the signals if they were given, and all testify that the bell was not rung nor the whistle sounded, and most of them are very positive on the subject. It is true, the testimony of these nine witnesses is contradicted by the five employees of the company, and that several of the nine occupied positions and relations to the son and father's estate which would naturally tend to bias them in favor of the plaintiff's side of the

case, and the cross-examination of some of them somewhat modified the testimony given on the direct; and similar criticisms may be properly made as to the testimony of defendant's witnesses. But as the case went to the jury upon this point, I cannot understand how it can be said that there was no testimony tending to prove that the signals were not given, or sufficient to be submitted to the jury.

These nine witnesses are not materially discredited save by the testimony of the five sworn on the part of the defence. The testimony for the plaintiff, as it stands in this record upon this subject, rises to the plane of evidence, and as such was entitled to the careful consideration of the jury. It raised the question of credibility of the defendant's witnesses, which is always a question for the jury, and, if believed, was quite sufficient to fix inexcusable negligence on the part of the defendant, and it would clearly have been usurpation in the court to have otherwise treated it.

It is said by counsel that the testimony of plaintiff's witnesses on this point is all negative in its character. This is true; but the fact which the law requires her to establish is also a negative one, and the value and weight of this class of testimony must necessarily depend upon the circumstances affording opportunity to render certain the facts stated; for instance, a brakeman located upon a train five coaches from the engine or bell is no more likely to hear the signals, when made, than a person standing upon the ground or sitting in a wagon listening for them at the same distance, when both are giving equal attention; and if the two are equally credible, there is no reason for believing the testimony of the one in preference to that of the other. The varying circumstances and surroundings can easily be brought out upon the trial and placed before the jury, and it is their duty to weigh them and ascertain the importance of each. It is no part of the duty of the court to balance up the evidence and determine the preponderance. The court can only consider the testimony so far as to determine whether there is any evidence to be passed upon, from which all inferences the jury may justifiably draw therefrom will be sufficient to support a verdict for the plaintiff, and if not, the court may direct a verdict for the defendant. And in a case like the one before us, it is the duty of the trial judge to determine whether any facts have been established by the evidence of the plaintiff from which negligence may be reasonably inferred. And it is for the jury to say whether, from these facts, negligence ought to be inferred. Such I understand to be the law. *Randall v. Baltimore and O. R. R. Co.*, 109 U. S. 482; s. c., 15 Am. & Eng. R. R. Cas. 243; *Pleasants v. Fants*, 22 Wall. 122; *Metropolitan R. R. Co. v. Jackson*, L. R. 3 App. Cas. 197; *Wittkowsky v. Wasson*, 71 N. C. 454; *Hyatt v. Johnson*, 91 Pa. St. 200.

WHERE CON-  
FLICTING EVI-  
DENCE WHETHER  
THE WHISTLE WAS  
SOUNDING, FACT  
SHOULD BE LEFT  
TO JURY.

In determining the question whether the case should or should not be submitted to the jury, the court cannot pass upon the credibility of the witnesses, or that of the other testimony in the case, but must assume the plaintiff's testimony to be true. If the court is satisfied that gross injustice has been done the defendant by a mistake of the jury, after proper instructions as to their duty in weighing and scrutinizing the testimony have been given, an opportunity should be afforded to make the correction by the circuit judge granting a new trial. I quite agree with the <sup>MEERE</sup> <sup>NEGATIVE TESTIMONY</sup> learned counsel for the defendant that in a case like this <sup>WEAK.</sup>

a witness, or any number of them, who simply testify that they did not hear the whistle sounded or the bell rung would furnish little or no evidence of the fact, unaccompanied by other circumstances, even though it was apparent that they might have heard both had they been listening or had their attention challenged to the fact, and that such statements hardly rise to the grade of competent testimony as against the evidence of one who swears, not only that he heard the signals, but himself gave some of them; but when a credible witness testifies that he was within hearing distance of the signals, and states positively that the bell was not rung nor the whistle sounded, and that he saw the train and the accident when it occurred, the testimony stands on a different basis, and cannot be discarded by court or jury, but must be considered with the other evidence in the case; and the fact that such a witness testifies upon his cross-examination that he did not hear the signals is not inconsistent with his former testimony, and in no sense necessarily weakens it, unless that was all he intended by his first statement. I do not think the cases cited by defendant's counsel go further than I have herein indicated upon this subject. *Jewell v. Parr*, 13 C. B. 915; *Seibert v. Erie R. R. Co.*, 49 Barb. 583; *Culhane v. New York Cent. R. R. Co.*, 67 Barb. 562; *Henze v. St. Louis, etc., R. R. Co.*, 71 Mo. 636; s. c., 2 Am. & Eng. R. R. Cas. 212. The verdict is general, and, of course, against the defendant on this point, and should not be disturbed unless testimony was erroneously admitted upon which it was based.

This injury occurred at a street crossing in the evening, between 9 and 10 o'clock. The night was quite dark, and it is undisputed that the train was running at the rate of 40 miles an hour, or about three rods per second, as it approached the crossing, going into Grand Junction. The crossing also appears to <sup>RUNNING AT HIGH SPEED—</sup> have been frequented by people travelling on foot and <sup>NEGLIGENCE.</sup> in vehicles by night and by day. There was also testimony in the case tending to show this to be a dangerous crossing, particularly in the night-time. Emil Klanowski and Henry Valkner gave testimony upon this point. In addition to their statements, the jury took a view of the premises under circumstances which must have aided in arriving at a correct conclusion upon this subject; and it is

claimed by plaintiff that the rate of speed at which the crossing was approached and made by defendant's train was too great,—unreasonably so,—and sufficient alone to account for the injury which occurred. We have no statute limiting the speed at which trains shall be run, either at highway crossing or elsewhere; neither has any by-law of the city of Detroit been called to our attention upon this subject, if the crossing was within the city limits, which does not appear by the record. Where there are such limitations by statute or local ordinance a rate of speed greater than that prescribed is generally regarded as gross negligence on the part of the company. *Chicago, etc., R. R. Co. v. Becker*, 84 Ill. 483; *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524, 531; *Karle v. Kansas, etc., R. R. Co.*, 55 Mo. 476; *St. Louis V. & T. H. R. R. Co. v. Dunn*, 78 Ill. 197, 199. When no restriction by statute exists, an unusual rate of speed at crossings must be held to impose upon the company increased vigilance as well as increased liability. And when from such cause the lives of persons or animals are endangered, and injury ensues, there can be, it seems to me, no reason why it should not be considered a want of proper care. The authorities generally hold such increased speed to be a proper subject for the consideration of the jury (*Artz v. Chicago, etc., R. R. Co.*, 44 Iowa, 284; *Black v. Burlington, etc., R. R. Co.*, 38 Iowa, 515; *Indianapolis, etc., R. R. Co. v. Stables*, 62 Ill. 313; *Wilds v. Hudson River R. R. Co.*, 29 N. Y. 315, 327; *Rockford, etc., R. R. Co. v. Hillmer*, 72 Ill. 235, 240; *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524, 531; *Warner v. New York, etc., R. R. Co.*, 44 N. Y. 465), and it has been held that 25 or 30 miles is an unreasonable rate of speed when approaching a crossing. *Reeves v. Delaware, etc., R. R. Co.*, 30 Pa. St. 454; *Massoth v. Delaware Canal Co.*, 64 N. Y. 524. Each case must necessarily depend upon its own peculiar circumstances; and whether or not proper care was made to appear in this particular was a question of fact for the jury, under proper instructions from the court.

I think the record shows a case of unusual speed and want of proper care under all circumstances; a half second less speed would, in all probability, have saved one life and injury to another, the extent of which time alone can determine. The evidence of the engineer shows that the speed was so great as to render the brakes comparatively useless for the purpose of preventing accident upon the crossing. The loss of life is becoming fearful in this class of cases, to say nothing of the amount of maiming and damage to property; and while courts are powerless to remedy the evil, it is their duty to see to it that such negligence as is culpable, when presented to them for adjudication, shall not be unreasonably or unlawfully excused. It is not only within the power of the company, but it is a duty it owes to the travelling public, to remedy such negligent action. If it cannot entirely prevent it, it

can greatly lessen the evil; and until such power is exercised and duly performed, it must abide the natural consequences of such neglect. Any other view would be outrageously unjust. I am not prepared to accept the intimation of the court in *McKonkey v. Chicago, B. & Q. R. R. Co.*, 40 Iowa, 206, that no conceivable rate of speed is *per se* evidence of negligence; neither my reason nor judgment approves it, and certainly all experience is the other way. Can it be doubted that every mile added to the speed of a train does increase the liability to accident; and if this be true, can it be doubted that were it increased to 100 miles an hour it would be difficult to confine the train to the track in many places? To expose human life to such risk would, in my judgment, be gross negligence on the part of the company.

The case of the *Grand Rapids & I. R. R. Co. v. Huntley*, 38 Mich. 540, I do not think has any application to the one we are considering. In that case the injury occurred by the breaking of an axle. It does not appear that the train was approaching a crossing or any other place of danger, or that the speed of the train had anything particularly to do with the injury complained of, or the accident that caused it; and, under the facts stated in the case, I think we must all agree that it was rightly decided.

The next question to be considered, under the view I have taken of the case, is, was the deceased guilty of that degree of carelessness which should excuse the defendant, even though negligent in the respect claimed by plaintiff? Defendant's counsel insists that he was, and that the undisputed testimony shows such to be the fact beyond a doubt. If counsel is correct in his view of the subject, it was then the duty of the court to direct a verdict for defendant. After a careful examination of all the testimony in the case bearing upon that point, I am unable to arrive at the conclusion reached by the learned counsel.

CONTRIBUTORY  
NEGLIGENCE—  
HELD FACTS  
SHOWED NONE.

The deceased, with his son Emil, started from Miller's house to go home, the son driving the team. They had to go 26 rods down the Miller road before they came to Miller's crossing. The defendant's track ran diagonally across the Miller road. The track was somewhat elevated above the Miller road, and the testimony tends to show the view from the Miller road was much obstructed by the company's fence, and weeds and bushes which had grown to a height of several feet above the fence, and, to use the language of one of the witnesses, "it was a mean track to cross;" that there was upon the side of the track, and 16 feet therefrom, a ditch and a narrow bridge over the same, about eight feet wide, to cross. Emil Klanowski says, in his testimony: "After leaving Miller's house they started to drive home; he was driving, sitting on a board across the wagon box, at the right hand of his father; they drove up near the crossing, and stopped at the telegraph pole (65 feet from the track); they stopped to see the cars, and could not see

them; there were too many weeds around them; they did not hear them; no whistle was blown or bell rung; it was cloudy,—not very dark, and not very light; could not see the light very well; the horses were gentle; drove from Miller's house on a walk; could not see the track from Miller's house, there were so many weeds on the side of the track; they were a good deal higher than the engine and cars; could not see anything for the weeds, that night; it was dark around there; could not see the track until they got there; had to go up hill to get upon the track; had never been on that road before, or at Miller's house; first looked for the train at the telegraph pole; stopped to look; thought the wagon was in the middle of the road five or six feet from the telegraph pole; he looked both ways; did not hear its whistle or the bell ring, or see the train; she did not whistle; they stopped at the pole to see if they could hear any train coming; did not hear or see any; had to pass over the bridge after he stopped; after he started he was looking so that he could get over the bridge; his attention was on his team and driving it; there were two tracks there which he had to cross; the bridge was about six feet from the track; he did not see the train; he looked until he got to the bridge; did not look for the train after he got onto the bridge; they stopped at the telegraph pole 'a good little while;' could not have seen the train from the pole if there had been one, because there were such big bushes beside the fence; you could not see the train until you got on the track; walked the horses across the bridge; drove slowly across the track; the bridge runs slanting; it is a small bridge, and not fit to go over with two horses; it is about four feet high from the ditch; that he did not look after the train after he got on the bridge, because he had to look out that he did not get into the ditch."

This is the statement of the survivor of the catastrophe of that fatal night; and from it it appears that he stopped his team for some time only 65 feet from the track, and looked both ways and listened before he approached the crossing, but did not hear or discover the train. This is all he could be required to do under the decisions of this court. *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 290; *Hass v. Grand Rapids & I. R. R. Co.*, 47 Mich. 401; s. c., 8 Am. & Eng. R. R. Cas. 268; *Chicago & N. E. R. R. Co. v. Miller*, 46 Mich. 533; s. c., 6 Am. & Eng. R. R. Cas. 89. That he did not see or hear the train, if his statements are true, was clearly the fault of the company in allowing the view to be obstructed and not giving proper signals, and not that of the young man. I do not think any such contributory fault on the part of the plaintiff is shown as would warrant the court in directing the verdict, and the ruling of the circuit judge to that effect was entirely proper. If there was any doubt upon the question, it was the duty of the court to give the case to the jury. *Teipel v. Hilsendegen*, 44 Mich. 461; *Pierce, R. R.* 314 *et seq.* I am



aware that there was strong testimony given tending to show that the young man was mistaken as to the amount and character of the obstructions, but that testimony cannot be considered in the discussion of the position taken by defendant's counsel upon the point he makes.

Quite a large number of cases have been called to our attention by counsel for defendant, in his brief upon the subject of contributory negligence, where injuries have been received at highway crossings, but a careful comparison of the facts in each with those in the present case will show a material difference. Some of them, however, are quite similar in many of their features; but I feel very certain that justice requires that omissions by the plaintiff which are not the result of negligence, or which may be fairly attributable to such fault on the part of the defendant, in such cases should not be regarded as contributory, and so far as any of the cases hold differently I should be unwilling to agree with them. I cannot consent under any circumstances to make the negligence of the company a shield and a weapon for its defence.

Witness Warner was examined on the part of the plaintiff, and testified to the pecuniary value of the life of the deceased to his family. The testimony was objected to by counsel for defendant, who asked to have the same stricken out on the ground that it was incompetent and irrelevant, and because it was made on a basis not warranted by the testimony in the cause. I do not think the objection well founded. The testimony of the wife furnished all the *data*, except Haswell's tables, which the witness used in making his computation. His testimony was a mere computation, which the jury could accept or not as they chose, according to their view of the testimony. The testimony was competent, and such as it is usual to resort to in such cases. The defendant could not be prejudiced by it, and no error was committed in receiving it. *Chicago & N. W. R. R. Co. v. Bayfield*, 37 Mich. 205.

I have now considered all the grounds relied upon for a reversal of the judgment in this case, and argued in the defendant's brief. The discussion contained therein relating to the demerits of the jury in our system of jurisprudence would be more properly addressed to the law-making power, or some branch thereof, than to this court. We have not the privilege of making the laws, but are charged with the duty of expounding them, and seeing to it that they are properly applied; further than this we cannot, and I think ought not, to go.

The charge by Judge Jennison was clear, and applicable to the facts in the case. I have discovered no error therein, or in his rulings upon the trial, of which the defendant can reasonably complain, and the judgment should be affirmed.

CHAMPLIN, J.—I agree with my brother Sherwood in the result

he has reached, and I agree with my brother Campbell that the testimony of the witness based upon Haswell's tables was inadmissible; but I do not think that the jury were misled thereby, as their verdict does not appear to be based upon this testimony, and the other testimony was sufficient to warrant the verdict they gave.

CAMPBELL, J.—The views expressed by my brother Sherwood upon some points are, I think, open to misapprehension; and while I think the case could not have been taken from the jury altogether, it is, in my opinion, only because the court could not pass upon disputed facts, and not because, as matter of law, it could be held that negligence was so made out as to entitle complainant to any such ruling.

It is not negligence for a company, chartered and authorized to carry on a business involving necessary risks, to do so in the usual and appropriate manner, and under such precautions as the law requires. When this is done the risks must be regarded as not involving fault. The party who seeks to recover must aver and prove in what manner the company has failed to do what it was its legal duty to do under the circumstances, and that the injury which resulted is caused by the averred wrong. In this case I am not prepared to say there was not conflicting testimony upon matters of legal duty on which the jury could properly pass, and therefore the case could not have been taken from them. But they could not be told as matter of law that any specific duty rested on the company which the law has not laid upon them. The speed of trains has not been so regulated in general, and has not been so far as the facts of this case are concerned.

I also think there was error in allowing Mr. Warner to testify to the jury what damages the family has sustained by the death of its head. The damages can only be what the family have lost in a pecuniary sense by his death. To ascertain this it was no doubt proper to allow considerable inquiry into the extent to which he contributed to their support. But so far as the probabilities of their or his future are concerned, the whole is so far conjectural that, so far as anything can be based upon such probabilities, it is not a matter for experts or witnesses, but for the jury, and no one else, subject to such restraint against excessive estimates as will prevent mischief. It would be absurd to suppose as a matter of fact that in a given case a particular person would live the full term of years which only few persons attain, or do in his old age all that he could do in his youth, or that a family of grown-up persons would depend upon him as children would in infancy. It is only because there is no certainty that any speculation is allowed at all, but to allow witnesses to give to the jury their guesses on the subject would be dangerous in the extreme.

There should be a reversal and new trial.

COOLEY, C. J., concurred.

See *Schofield v. Chicago, etc., R. R. Co.*, 19 Am. & Eng. R. R. Cas. 858; notes to *Ramson v. Chicago, etc., R. R. Co.*, 19 Am. & Eng. R. R. Cas. 16; *Loucks v. Chicago, etc., R. R. Co.*, 19 Am. & Eng. R. R. Cas. 305; *Pence v. Chicago, etc., R. R. Co.*, *Ib.* 366; *Randall v. Baltimore, etc., R. R. Co.*, 15 Am. & Eng. R. R. Cas. 248 and note. Also note 6 Am. & Eng. R. R. Cas. 123.

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## RHOADES

v.

### CHICAGO AND GRAND TRUNK R. R. Co.

(*Advance Case, Michigan. October 28, 1885.*)

Where there is a conflict of testimony, even where one is of a positive and the other of a negative character, the facts must be determined by the jury.

A person is required to use reasonable caution and care at all times in approaching a railway crossing; particularly so when a "fast train" is due and approaching; and if one drives his team perilously near, and they become unmanageable and go upon the track and injury results, there is such contributory negligence as will prevent recovery.

ERROR to Cass.

*Edward Bacon* for plaintiff and appellant.

*E. W. Meddough* and *H. Geer* for defendant.

CAMPBELL, J.—This action was brought to recover damages for the death of plaintiff's intestate, who was killed by an express train of defendant on the afternoon of December 11, 1882, at a cross-road not far from Edwardsburg. The deceased had been at Edwardsburg with a buggy drawn by a horse and a mule, and was returning on a north and south road which crossed the railway at a somewhat acute angle, when a train, which had passed Edwardsburg, and was going southerly towards the crossing, struck his team on the crossing and killed him and one of his animals. It was claimed by plaintiff that the train did not give the proper signals, so as to inform him of its coming, and that when he was near the crossing, and the cars were rushing up behind him, a series of sudden sharp whistles frightened his team, and made them unmanageable, so that they ran upon the track in spite of his efforts to hold them. The defence relied on lack of fault or neglect in the defendant's servants, and on the negligence of the deceased.

There was contradictory testimony concerning the statutory signals, some persons swearing that they were given, and some that they were not. Most of the latter was, of course, negative testimony to the effect that the witnesses did not hear the signals. One witness swore that he saw the bell, and that

NEGLIGENCE—  
TAKING  
CARE  
FROM JURY.

it was not moving. The fact that sudden and repeated loud whistles were given, and frightened the animals was shown by testimony which was positive. We cannot hold, as we were asked to hold, that where positive proof is met by negative proof, the former must govern. The testimony, if it conflicts, must go to the jury, unless under possible peculiar circumstances, which do not usually arise. We have no doubt that, upon the question of defendant's negligence, these were facts for the jury, whatever we may ourselves think of the weight of testimony; and if that were the only issue, we should feel bound to hold that the court below erred in taking the case from the jury and ordering a verdict for the defendant.

But upon the question of contributory negligence there is such positive testimony given by the plaintiff's own witnesses as to leave no room for dispute. It appeared from the testimony that the train in question was not a stray or irregular one, but a fast train that might fairly be expected at the time when it came.

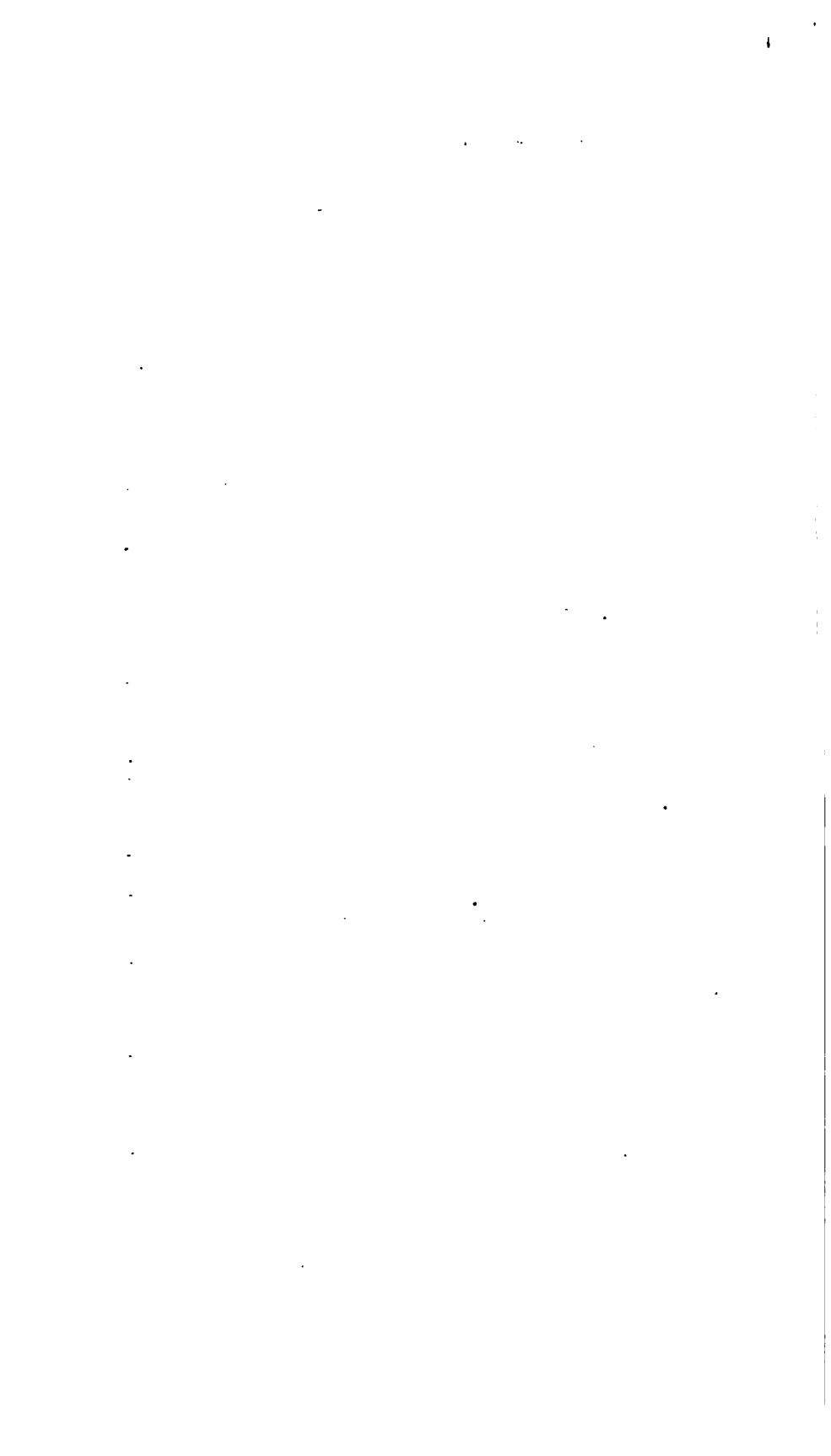
It further appeared that the view of any such train was substantially unobstructed for a long distance along the road on which deceased was travelling, so that by turning his head at any time during its approach he must have seen it. He was moving along at an easy trot, and could at any time until he neared the crossing have stopped. He was not a stranger, but was familiar with the road and its surroundings. The testimony for plaintiff shows that he kept on at the same gait until he reached very near the crossing, where his animals were frightened as the train came on behind them, and rushed upon the railway. There is no testimony that he paid the least attention to the train, or looked around at any time to observe whether it was coming. On the other hand, it was shown quite clearly that he could not have done so.

The authorities are so uniform that a person must use reasonable caution in approaching a railway at all times, and especially when a rapid train is due or approaching, that it is hardly necessary to cite them. It is negligence to approach a crossing with animals so nearly as to involve apparent danger to life. A train going at the rate of forty miles an hour will not only destroy anything which it hits, but common experience shows that it creates considerable danger, by its sudden passing, of startling and bewildering both persons and animals approaching very closely. In the present case, the deceased did not actually drive his horses upon the railway, but he drove them so near that he brought them into imminent danger of going on the track in case anything happened to frighten them. The testimony concerning the proximity of the train when the last whistles were sounded shows that the buggy must have come very close to the crossing; as even at their highest speed they could not have reached the track before the train passed unless he had already

driven perilously near. There is a brief space of time just before the collision, when plaintiff's witnesses did not apparently see him. But their testimony covers enough time to leave no room for doubt that the cause of the mischief was in part, if not chiefly, his voluntary advance into danger. The account they give of his action and appearance during his ride from Edwardsburg seems to indicate that, from illness or some other cause, he was absent-minded and probably oblivious of the surroundings which appear to have drawn the attention of quite a number of persons near by. He was seen the instant before the fatal accident trying to hold his team, but they were then just reaching the track, when the mule which was on the near side was struck just behind the shoulder, and, with the driver, was instantly killed. Upon a careful review of the testimony, we are unable to see that the circuit judge could have given any different ruling than he did give, and the judgment must be affirmed.

MORSE, C. J., and CHAMPLIN, J., concurred; SHERWOOD, J., concurs in the result.

See note to *Klanowski v. Grand Trunk, etc., Ry. Co.*, *ante*.



## INDEX.

NOTE.—The mode of citing the American and English Railroad Cases is :  
21 Am. & Eng R. R. Cas.

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THE index contains references both to the cases and to the notes. The references for propositions in the cases are to the pages upon which the respective cases begin. For the notes the references are distinguished by the italic *n* following the page reference, and are to the pages upon which the propositions are found.

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— Same. Ratification not shown. *Wood v. Chicago, M. & St. P. R. R. Co.* (Iowa). 86.

Fireman has no implied authority to receive passengers' fares or compensation for transportation. *Rucker v. Mo. Pac. R. R. Co.* (Tex.). 245.

General passenger-agent: private instruction to, limiting his authority, when not made known to contracting party not binding on such party. *Houston & Tex. Cent. R. R. Co. v. Hill* (Tex.). 263.

Holding out: station-agent is not held out as having authority to contract to furnish cars. *Wood v. Chicago, M. & St. P. R. R. Co.* (Iowa). 86.

Ostensible authority is measure of agent's power as to third person. *Peoria & Pekin Union R. R. Co. v. Buckley* (Ill.). 94.

Ostensible authority of railway-agent binds company as to third persons. *Brooke v. New York, L. E. & M. R. R. Co.* (Pa.). 64.

Ostensible authority sufficient to bind principal proved by proof that agent has been accustomed to make similar contracts for the principal with his knowledge, approbation, and ratification. *Texas Pac. R. R. Co. v. Nicholson* (Tex.). 133.

Ticket-agent authorized to sell, stamp, and deliver tickets on receiving pay therefor, cannot bind company by stamping and delivering tickets to a third person without the company's knowledge, to be sold by him, and paid for when sold. *Frank v. Ingalls* (Ohio). 277.

*Employees' Rights: Liability of Company.*

Brakeman: rights and risks of, considered. *Little Rock, etc., R. R. Co. v. Townsend* (Ark.). 619.

Employee as passenger on company's train: when voluntarily so, company held not liable for injury to such employee resulting from accident to such train. *Dallas v. Gulf, etc., R. R. Co.* (Tex.). 575.

Employment of minor as brakeman; injury to him; recovery by parent. 592 n.

Liability of company for injury to employee must proceed from some duty which it owed employee, arising from contract or from the relation itself; and failure to perform that duty must have been the proximate cause of the injury. *Little Rock, etc., R. R. Co. v. Townsend* (Ark.). 619.

Liability of company to employees for injury from defective machinery. Notice to company. No recovery if employee had notice. 604 n.

Machinery: company's duty to employees in respect to. See NEGLIGENCE.

Machinery, patent defect in: injury to employee from: liability in case of. 642 n.

*Fellow-servant. Exemption of Master from Liability.*

Agent or servant injured by act of fellow-servant: doctrine of master's exemption from liability therefor and limitations thereon reviewed. 514 n and 581 n.

Baggage-master is a fellow-servant of a switch-tender. 583 n.

Car-repairer and locomotive engineer are fellow-servants. *Texas & P. R. Co. v. Harrington* (Tex.). 571.

Car-repairer under car: duty of co-employees as to guarding him from injury. 575 n.



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- Command to servant by superintendent, with threat of dismissal in case of disobedience, to board a moving train and go to another point for work; and injury to such servant in obeying, from negligence of engineer, is injury by tort of fellow-servant, and company is not liable. *Capper v. Louisville, etc., R. R. Co. (Ind.)*. 525.
- Company not liable for injury inflicted on its servant resulting from performance of duties incident to his employment. *Dallas v. Gulf, etc., R. R. Co. (Tex.)*. 575.
- Conductor applying brakes in such manner as to injure brakeman: company not liable therefor if conductor acted as a reasonable man, with due care, in so doing. *Dunlavy v. Chicago, etc., R. R. Co. (Iowa)*. 542.
- Conductor of construction-train, with gang of laborers under him, is, as to such men, the vice-principal of the company, and not a fellow-servant of such men. Company liable for injury to such men through his negligence. *Chicago, etc., R. R. Co. v. Lundstrum (Neb.)*. 528.
- Conductor of gravel-train and laborers on track are fellow-servants. 534 *n*.
- Defect in machinery as notice to employee injured. 581 *n*.
- Dual relation. One may be both fellow-servant and vice-principal. *Moore v. Wabash, etc., R. R. Co. (Mo.)*. 509.
- Employee being carried while not engaged in service of company is a stranger, and entitled to all the remedies he would have had if he had not been a servant. *Abell v. Western Md. R. R. Co. (Md.)*. 503.
- Employers' Liability Act of Kansas applied to case of section-man, and other employee who let a rail drop on him. *U. P. R. R. Co. v. Harris (Kan.)*. 584.
- Employers' Liability Act, 1890 (43 and 44 Vict. c. 42), reviewed. 582 *n*.
- Flying-switch: rule of company as to, violated by fellow-servant, which violation led to injury to plaintiff, *held* not to increase company's liability, and *held* immaterial. *Youll v. Sioux City & P. R. R. Co. (Iowa)*. 589.
- Foreman and car-repairer *held* not fellow-servants: foreman is employed to discharge master's special duty, and stands in his stead. As to his torts injuring a servant, *respondent superior* applies. *Moore v. Wabash, etc., R. R. Co. (Mo.)*. 509.
- Foreman and laborer *held* fellow-servants: for death of laborer caused by neglect of foreman to perform duty to keep track in repair and clean, company is not liable. *Rochester, etc., R. R. Co. v. Brick (N. Y.)*. 605.
- Foreman, except where the master's duties are delegated to him, is a fellow-servant. *Capper v. Louisville, etc., R. R. Co. (Ind.)*. 525.
- Hand-car colliding with belated train, injuring employee on hand-car: company not liable. 541 *n*.
- Foreman: hand-car man returning on hand-car after proper time, under foreman's orders, and injured in so doing, company liable. *McKinne v. California Southern R. R. Co. (Cal.)*. 539.
- Hand-car on track meeting belated train. Order to abandon hand-car: Appellee failing to obey with sufficient promptness: company *held* not liable. *International, etc., R. R. Co. v. Hester (Tex.)*. 535.
- Incompetency or untrustworthiness of fellow-servant, who caused the injury, known to company, would render company liable therefor. *Dallas v. Gulf, etc., R. R. Co. (Tex.)*. 575.
- Infancy or minority of injured employee, will not entitle him to recover for injury sustained in course of employment which he entered, and which in absence of evidence he will be presumed able to do. *Youll v. Sioux, etc., R. R. Co. (Iowa)*. 589.
- Inspector of cars stands in position of company towards its employees, company is liable for injury to employee resulting from his negligence. *Tierney v. Minneapolis, etc., R. R. Co. (Minn.)*. 545.
- Inspector's failure to inspect cars according to company's rules, resulting in accident to employees, is imputable directly to company. Car-inspector

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is not laborer's fellow-servant. *Tierney v. Minneapolis, etc., R. R. Co. (Minn.)*. 545.

Machinery, defective, use by a servant of such machinery furnished by master, though negligence in servant, does not relieve master from responsibility to a fellow-servant injured thereby. *Rausier v. Minneapolis, etc., R. R. Co. (Minn.)*. 601.

Ordinary ability to perform duties of the particular service for which he is employed is contracted for. *International, etc., R. R. Co. v. Hester (Tex.)*. 535.

Ordinary risks are assumed by section-hand, but not risks from negligence of company itself, or its representative standing toward employer in position of company itself. *International, etc., R. R. Co. v. Hester (Tex.)*. 535.

Ordinary risk assumed by laborer does not include risk from defective machinery, or neglect to inspect machinery and cars. *Tierney v. Minneapolis, etc., R. R. Co. (Minn.)*. 545.

Passenger assisting in pushing a car at request of operative is not a fellow-servant with operative or with any of company's employees, and company is liable for injury to passenger at such time. *McIntyre R. R. Co. v. Bolton (Ohio)*. 501.

Rock-blaster fellow-servant with teamster. 582 n.

Section-hand and engineer engaged in wrecking are fellow-servants. 583 n.

Section-hand repairing track by placing new rails in place of old ones is fellow-servant with other employees who in handing him a rail let it drop on him, and within Kansas Employers' Liability Act. *U. P. R. R. v. Harris (Kan.)*. 584.

Sunday, work on, will not change relation of fellow-servants. 583 n.

Switch-tender is fellow-servant with baggage-master. 582 n.

Teamster and rock-blaster are fellow-servants. 583 n.

Track-repairer injured by rail let fall on his finger. 588 n.

Train-despatcher controlling hours of trains, and laborer on such trains not fellow-servants. *McKinne v. California Southern R. R. Co. (Cal.)*. 539.

Two servants employed by same master, laboring under same control, deriving authority and receiving compensation from a common source, and engaged in same business, though in different departments of the common service, are fellow-servants. *Texas & P. R. R. Co. v. Harrington (Tex.)*. 571.

Wrecking engineer and section-hand are fellow-servants. 583 n.

**Risks of Business: Contract of Employees.**

See FELLOW-SERVANT, *supra*.

Defect in coupling-pin, known to brakeman, and defect in draw-bar unknown either to company or brakeman, combining to injure such brakeman: brakeman *held* to have taken all risks, and company not liable. *Atchison, etc., R. R. Co. v. Wagner (Kan.)*. 637.

Distinction between passenger and employee as to risks. *Atchison, etc., R. R. Co. v. Wagner (Kan.)*. 637.

Employee engaged in throwing mail-bag into train and injured in course of such employment, *held* not entitled to recover. *Coolbroth v. Me. Central R. R. Co. (Me.)*. 599.

Hazardous business: employee in, takes the ordinary risks of such business. So of fireman required to "buck snow." *Bryant v. B., C. R. & N. R. R. Co. (Iowa)*. 598.

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Conductor's wrongful act: in suing company, plaintiff must prove that conductor was company's servant at the time. *Sullivan v. Ore. R. R. & Nav. Co. (Oreg.)*. 391.

— One company operating another's road-bed—question of employment: payment by one company not alone proof that it was employer. *Sullivan v. Ore. R. R. & Nav. Co. (Oreg.)*. 391.

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Independent contractor: where owner reserves over that which he permits to be used by another (*e.g.*, a contractor) the essential powers of a master, he is responsible for the acts of his servants acting partly under the will of such contractor. *Burton v. Galveston, H. & S. A. R. R. Co. (Tex.)*. 218.  
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- prove that machinery furnished was sound. E. Tenn., etc., R. R. Co. v. Stewart (Tenn.). 614.
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- Presumption of negligence raised by certain facts may impose burden of, showing due care by person so presumed negligent. Balto. & O. R. R. Co. v. State (Md.). 202.

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- Derailment of car: railway company presumed negligent in case of. Bedford R. R. Co. v. Rainbolt (Ind.). 466; Texas & St. L. R. R. Co. v. Suggs (Tex.). 475.
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**COLORED PERSONS.**

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Cars: safe, must be furnished for employees. *Tierney v. Minneapolis, etc., R. R. Co.* (Minn.). 545.

— Inspection of so far as necessary to safety, is a duty company owes to its employees. *Tierney v. Minneapolis, etc., R. R. Co.* (Minn.). 545.

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Lessor company liable for injury to passenger of lessee company operating road, resulting from negligence of lessee's servants. *Singleton v. Southwestern R. R. Co.* (Ga.). 226.

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Baggage: limitation in ticket as to, not binding on passenger unless known to him, or his omission to ascertain amounts to negligence *per se*. *Mauritz v. New York, L. E. & W. R. R. Co.* (U. S. C. C. Wis.). 286.

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- Passenger who cannot read, not bound by limitations printed in ticket, but not explained to him. *Mauritz v. New York, L. E. & W. R. R. Co.* (U. S. C. C., Wis.). 286.
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- Carrier claiming limitation of his liability, by acts of shipper, has. *Rosenfield v. Peoria, D. & E. R. R. Co.* (Ind.). 87.
- Burden of proof is on carrier to show (1) existence of contract of limitation; (2) that the case is within the contract; and (3) freedom from negligence. *Chicago, St. Louis & N. O. R. R. Co. v. Ables* (Miss.). 105.
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- By express contract: carrier has right to make. *Cream City R. R. Co. v. Chicago, M. & St. P. R. R. Co.* (Wis.). 70.
- Contract: carrier may by express contract exclude liability except for negligence of himself, agents, and employees. *Cream City R. R. Co. v. Chicago, M. & St. P. R. R. Co.* (Wis.). 70.
- Contract excluding liability for loss by fire is valid. *Little Rock, M. R. & T. R. R. v. Harper & Wilson* (Ark.). 97.
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- Fire: "appliances to prevent," mentioned in contract held to mean water and buckets. *Chicago, St. Louis & N. O. R. R. Co. v. Moss & Co.* (Miss.). 98.
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- Insurer: liability as, may be limited. *Rosenfield v. Peoria, D. & E. R. R. Co.* (Ind.). 87.
- But not liability for negligence or fraud to a specified sum. *Rosenfield v. Peoria, D. & E. R. R. Co.* (Ind.). 87.
- Limitation of value of certain class of property to a specified sum printed in bill of lading not binding. *Chicago, St. Louis & N. O. R. R. Co. v. Abels* (Miss.). 105.
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- Negligence of servants: carrier may exclude liability for, by contract. *Wilson v. N. Y. Cent. & H. R. R. R. Co.* (N. Y.). 148.
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Collision of trains of different companies at crossing: suit by passenger in one train against company operating the other train: passenger need not aver or prove negligence of company operating train in which he was: he may recover, although company carrying him was negligent. *Pittsburgh, etc., R. R. Co. v. Spencer (Ind.)*, 478.

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- Expulsion from train: refusal to pay fare, as ground for, must be clearly made out: tender of customary fare which is less than amount demanded by conductor is not such refusal. *Tex. & Pac. R. R. Co. v. Bond (Tex.).* 418.
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- Defect in machinery being proved, without further proof as to its nature or discoverability, or as to want of care by company, *held* not to constitute a case of negligence. *Atchison, etc., R. R. Co. v. Ledbetter (Kan.)*. 555.
- Degrees of, discarded. *Bedford, etc., R. R. Co. v. Rainbolt (Ind.)*. 466.
- Derailment evidence of negligence. 478 n.
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- Door: closing of, without giving warning, whereby plaintiff's hand was crushed: *held*, error in particular case to instruct that it was negligence. *Gulf, Houston & S. A. R. R. Co. v. Davidson (Tex.)*. 481.
- Negligent closing of: injury thereby, ground for recovery. 484 n.
- Due care is such as an ordinarily prudent man would exert under like circumstances. *Leland v. Chicago, M. & St. P. R. R. Co. (Iowa)*. 108.
- Evidence *held* to fail to make case of, and to be such as to make clear case for compulsory nonsuit. *Forty-second St. & G. S. F. R. R. Co. v. Hayes (N. Y.)*. 858.

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- Evidence of, in particular case, *held*, not to be sufficient to sustain verdict. *Houston & Texas Cent. R. R. Co. v. Schmidt* (Tex.). 345.
- Evidence of negligence on both sides: trial court entered judgment for defendant *non obstante veredicto* for plaintiff. *Held*, proper. *Adams v. Louisville & Nash. R. R. Co.* (Ky.). 380.
- Facts being undisputed, negligence is question of law: facts being disputed, negligence is mixed question of law and fact to be submitted to jury under instructions from court. *Pittsburgh, etc., R. R. Co. v. Spencer* (Ind.). 478.
- Failure to look where walking, is contributory negligence, when. *Potter v. Wilmington & W. R. R. Co.* (N. Car.). 328.
- Failure to provide passenger a safe place on train, whereby passenger is obliged to ride in unsafe place, *e.g.*, on platform, is evidence of negligence. *Long Island R. R. Co. v. Werle* (N. Y.). 429.
- Fire set by locomotive. *Prima-facie* case of negligence by railway company and of liability. *Leland v. Chicago, M. & St. P. R. R. Co.* (Iowa). 108.
- Gross, by carrier, must be shown under Mississippi statute, where plaintiff was passenger on freight train not intended for both passengers and freight. *Perkins v. Chicago, St. Louis & N. O. R. R. Co.* (Miss.). 242.
- Hand-car: defective crank, injury from: employee knowingly using takes all risks. *N. Y., L. E. & W. R. R. Co. v. Powers* (N. Y.). 609; and see note 613 n.
- Highway and railway crossing: reasonable care and caution required of all persons approaching: particularly at times when "fast train" is due: if one drive his team perilously near, and they become unmanageable and go upon the track and injury results, there is contributory negligence preventing recovery. *Rhoades v. Chicago & Grand Trunk R. R. Co.* (Mich.). 659.
- Highway crossing: plaintiff driving wagon across: evidence *held* to show no contributory negligence. *Klanowski v. Grand Trunk R. R. Co., etc.* (Mich.). 648.
- Infancy or minority of employee will not entitle him to recover for injury sustained in course of employment which he entered, and which in absence of evidence he will be presumed able to do. *Youll v. Sioux City, etc., R. R. Co.* (Iowa). 589.
- Injury causing death: plaintiff in action for, has no burden of proving absence of contributory negligence when decedent was a passenger. *McKimble v. Boston & Maine R. R. Co.* (Mass.). 218.
- Injury to person about to take train, by catching her foot in the rail: rail being not defective, and injury avoidable if she had been looking down: *held*, that railway company was not liable. *Potter v. Wilmington & Weldon R. R. Co.* (N. Car.). 328.
- Inspection of cars: failure of inspector to do duty imposed on him by company's rules, resulting in accident to employees, is negligence imputable directly to company. *Tierney v. Minneapolis, etc., R. R. Co.* (Minn.). 545.
- Inspection of cars received from another company for through transportation: duty of company as to. 561 n.
- Instinct of man in danger to save his own life: instruction that jury must consider that in determining as to contributory negligence. *Dunlavy v. Chicago, etc., R. R. Co.* (Iowa). 542.
- Insurer: company is not, of machinery, as to employees. *Atchison, etc., R. R. Co. v. Ledbetter* (Kan.). 555.
- Intoxication as contributory negligence. 349 n.
- Jerk of car followed by accident: plaintiff is not bound to produce affirmative proof of connection of injury to him with the jerk, it appearing that the injury would not have happened if defendant had exercised due care. *Dougherty v. Missouri R. R. Co.* (Mo.). 497.
- "Kicking" back cars in switching: injury to brakeman coupling such cars: is company negligent in making such coupling, or brakeman negligent in

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- attempting it: question for jury: practice of company in that respect admissible. *Henry v. Sioux City, etc., R. R. Co. (Iowa).* 644.
- Leaping from moving train. See "Alighting from moving train," *supra*, under head NEGLIGENCE.
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- Limitation of liability for. See COMMON CARRIERS: *Limitation of Liability.*
- Live-stock, person riding with, under contract, without special payment as passenger, entitled to transportation with ordinary care. *Lawson v. Chicago, St. P., M. & O. R. R. Co. (Wis.).* 249.
- Machinery.**
- Coupling of cars: dissimilar couplings brought together, resulting in injury to employee attempting to couple cars: company not liable for injury. His menus of knowledge held superior to company's. *Kelly v. Wisconsin Central R. R. Co. (Wis.).* 633.
- Defect in coupling-pin known to brakeman, and defect in draw-bar unknown either to company or brakeman, combining to injure such brakeman: brakeman held to have taken all risks, and company not liable. *Atchison, etc., R. R. Co. v. Wagner (Kan.).* 637.
- Defects: knowledge and notice of employee as affecting company's liability. 643 n.
- Employee knowingly continuing to work with and upon defective machinery, *e.g.*, a hand-car with a broken lever, with an imperfect temporary substitute, held to take the risk of all accidents ensuing therefrom. *N. Y., L. E. & W. R. R. Co. v. Powers (N. Y.).* 609.
- Employee using defective machinery with knowledge of defects therein, held to take all risks. *N. Y., L. E. & W. R. R. Co. v. Powers (N. Y.).* 609.
- Greatest practicable care in keeping machinery in safe condition required. Slightest negligence therein raises liability. *Bedford, etc., R. R. Co. v. Rainbolt (Ind.).* 466.
- High and low freight-cars coupled together: no actionable negligence by company in using such cars together resulting in injury to servant who knowingly incurred the risk. *St. Louis, etc., R. R. Co. v. Higgins (Ark.).* 629.
- Inspection of machinery: company is bound to inspect machinery often enough to maintain it at all times in safety. *Tierney v. Minneapolis, etc., R. R. Co. (Minn.).* 545.
- Notice of defect in: company should make suitable provisions to obtain notice of, and to remedy same, or it will be liable for injury resulting therefrom. *Warden v. Old Colony R. R. Co. (Mass.).* 612.
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- Use by a servant, of defective machinery delivered to him by master, though negligence in servant, does not relieve master from responsibility to a fellow-servant injured thereby. *Rausier v. Minneapolis, etc., R. R. Co. (Minn.).* 601.
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- should prevent it, though done by one not in company's employ. *Carpenter v. Boston & Albany R. R. Co. (N. Y.). 331.*
- Moving train: company through its conductor inducing passenger to leave train while in motion is guilty of negligence. *Rucker v. N. Y. Cent. & H. R. R. Co. (N. Y.). 361.*
- It is not negligence *per se* for passenger to leave train while in motion. *Rucker v. N. Y. Cent. & H. R. R. Co. (N. Y.). 361.*
- Leaping from, as contributory negligence, when. 364 *n.*
- Leaving, at conductor's suggestion, may be question for jury. *Bucher v. N. Y. Cent. & H. R. R. Co. (N. Y.). 361.*
- Passenger leaving, at conductor's request, is not guilty of negligence. *Bucher v. N. Y. Cent. & H. R. R. Co. (N. Y.). 361.*
- Nearsightedness of engineer whose locomotive produced injury: retention of such engineer in employment not necessarily negligence in company. *Texas, etc., R. R. Co. v. Harrington (Tex.). 571.*
- Obedience to instruction of station-agent to cross track, resulting in death, makes railway company liable in absence of delay or contributory negligence. *Balto. & Ohio R. R. Co. v. State of Md. (Md.). 302.*
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- Passengers: duty of railway company to, exceeds reasonable care. Safety of passenger must be provided for as far as human foresight will go. *Kellow v. Central Iowa R. R. Co. (Iowa). 485.*
- Passenger lawfully on train may recover for injury caused by railway company's negligence, though he has paid no fare. *Prince v. International & G. N. R. R. Co. (Tex.). 152.*
- Passenger on locomotive pilot guilty of. *Rucker v. Mo. Pac. R. R. Co. (Tex.). 245.*
- Passenger's position at time of injury: failure of evidence may not prevent a recovery. *Kellow v. Central Iowa R. R. Co. (Iowa). 485.*
- Perilous place: passenger riding in: permission of employees. 248 *n.*
- Plaintiff has no burden to prove freedom from. *Dallas & Wichita R. R. Co. v. Spicker (Tex.). 160.*
- Platform riding, in absence of other seat, not negligence *per se*. *Long Island R. R. Co. v. Werle (N. Y.). 429.*
- Pleading as to: averment expressly by plaintiff of freedom from contributory negligence not necessary where that fact is fairly inferable from the other averments of the plaintiff. *Bedford, etc., R. R. Co. v. Rainbolt (Ind.). 466.*
- Presumption of negligence by defendant raised by proof that plaintiff, a passenger in defendant's railway car, was injured while riding therein, without fault of his own. *Bedford, etc., R. R. Co. v. Rainbolt (Ind.). 466.*
- Prima-facie* case of, must be made out by plaintiff. *Forty-second St. & G. S. F. Co. v. Hayes (N. Y.). 358.*
- Prima-facie* case: proof of injury and of facts and circumstances from which negligence of defendant may be fairly inferred, constitutes a *prima-facie* case. *E. Tenn., etc., R. R. Co. v. Stewart (Tenn.). 614.*
- Proof of injury and of facts leaving it doubtful whether injury resulted from defect of machinery or from plaintiff's own negligence does not make a *prima-facie* case. *E. Tenn. R. R. Co. v. Stewart (Tenn.). 614.*
- Proof of injury will not alone make such a case, or shift burden of proof. *E. Tenn., etc., R. R. Co. v. Stewart (Tenn.). 614.*
- Proof of, must be made by plaintiff, and must extend to all facts necessary to constitute a case of negligence. *Atchison, etc., R. R. Co. v. Ledbetter (Kan.). 555.*
- Mere proof of defect in car not proof of negligence. *Atchison, etc., R. R. Co. v. Ledbetter (Kan.). 555.*
- Proximate and remote cause: collision with cars of another company: proximate cause of accident may be equally negligence of both companies. *Kellow v. Central Iowa R. R. Co. (Iowa). 485.*

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- \* Proximate cause: mere proof of negligence of company insufficient to make company liable for injury to employee. Such negligence must have been proximate cause of injury. *Little Rock, etc., R. R. Co. v. Townsend* (Ark.). 619.
- Question of presence of contributory negligence is one of fact. *Bucher v. N. Y. Cent. & H. R. R. Co.* (N. Y.). 361.
- Rebuttal of, presumption of: evidence as to circumstances of accident, character and condition of track, cars, roadbed, speed, and management of train, and expert testimony as that cars and track were well built and in good condition, and that train was well managed, *held* proper to go to jury. *Eldridge v. Minn. & St. L. R. R. Co.* (Minn.). 494.
- Risks assumed by employee by riding on hand-car with broken lever. *N. Y., L. E. & W. R. R. Co. v. Powers* (N. Y.). 609.
- Signals: conflict of evidence as to failure to give: question is for jury as to credibility and weight of evidence: direction of verdict improper. *Klanowski v. Grand Trunk R. R. Co., etc.* (Mich.). 648.
- Special verdict finding numerous facts, but none from which court can deduce negligence as conclusion of law, is bad: *venire de novo* awarded. *Pittsburgh, etc., R. R. Co. v. Spencer* (Ind.). 478.
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- Stops: failure of company to stop train at regular station to which it has sold a ticket, and where passenger wishes to alight, is culpable negligence. *Bucher v. New York Cent. & H. R. R. Co.* (N. Y.). 361.
- Stopping near station on dark night, in vicinity of other moving trains, whereby passengers were induced to alight, and were injured by other trains, questions of negligence and contributory negligence for jury. *Boss v. Prov. & W. R. R. Co.* (R. I.). 364.
- Stopping on a switch: passenger alighting in the dark, supposing it to be the station and being injured by other trains: negligence and contribution thereto for the jury. *Boss v. Prov. & W. R. R. Co.* (R. I.). 364.
- Stopping train: time to apply brakes: question whether conductor waited a reasonable time for signal before applying the brakes, is question for the jury. *Dunlavy v. Chicago, etc., R. R. Co.* (Iowa). 542.
- Street-car: passenger on front platform stepping down on front step to make room for others, and up again, and thrown off in so doing, *held* not entitled to recover. *Forty-second St. & G. S. F. Co. v. Hayes* (N. Y.). 358.
- Starting and stopping of: evidence as to, *held* not to show any negligence in. *Forty-second St. & G. S. F. Co. v. Hayes* (N. Y.). 358.
- Taking train at other place than station platform, not negligence as matter of law: and answer relying solely on such matter as defence, is demurrable. *Stoner v. Pa. Co.* (Ind.). 340.
- Track, defect in, not shown nor presumed from proof that brakeman fell through the cross-ties into a culvert. *Little Rock, etc., R. R. Co. v. Townsend* (Ark.). 619.
- Track: negligence in care of, and of buildings adjacent. See **TRACK**.
- Warehouse: negligence in keeping what is *prima facie*. *Leland v. Chicago, M. & St. P. R. R. Co.* (Iowa). 108.

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- Cross errors: one allowance of: assignment of, by successful party necessary to obtain review of such errors. *Singleton v. Southwestern R. R. Co.* (Ga.) 226.
- Disagreement of physicians as to nature of plaintiff's injury not sufficient ground for setting aside verdict where all agreed that he was injured. *Texas & St. L. R. R. Co. v. Suggs* (Tex.). 475.
- Discretion as to: discretion of court of appeal not so great as that of trial judge who heard the evidence, but should be exercised when record shows

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- General verdict being in proper form, failure of jury to answer interrogatories does not authorize *venire de novo*. *Bedford, etc., R. R. Co. v. Rainbolt* (Ind.). 466.
- Holding of new trial at same term as first not objectionable: at least, unless continuance was asked at the time. *Texas & Pac. R. R. Co. v. Garcia* (Tex.). 884.
- Misconduct of jurors as ground for: ruling as to, made on conflicting affidavits not reversed unless clearly erroneous. *Tierney v. Minneapolis, etc., R. R. Co.* (Minn.). 545.
- Newly discovered evidence as ground for, is in discretion of court, which is controlled only in case of abuse. *Eldridge v. Minn. & St. L. R. R. Co.* (Minn.). 494.
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- Advancement of charges by members of connecting lines successively will not constitute them partners. 4 n.
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- Code of Wyoming: defendant entitled to plead any number of defence: fact not inconsistent: and defences should never be held inconsistent if both may be true. *Lake Shore & M. S. R. R. Co. v. Warren* (Wy. T.). 302.
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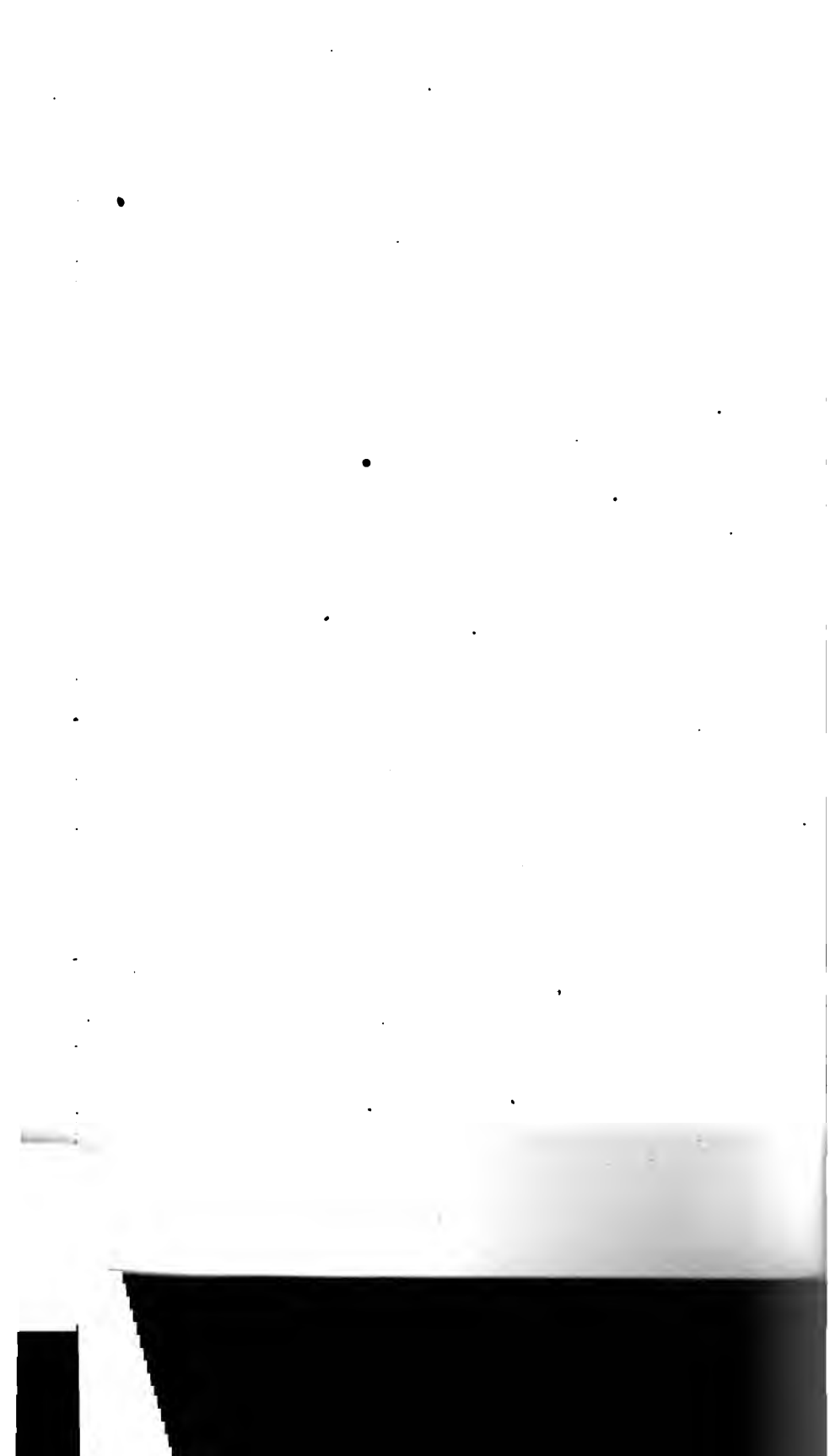
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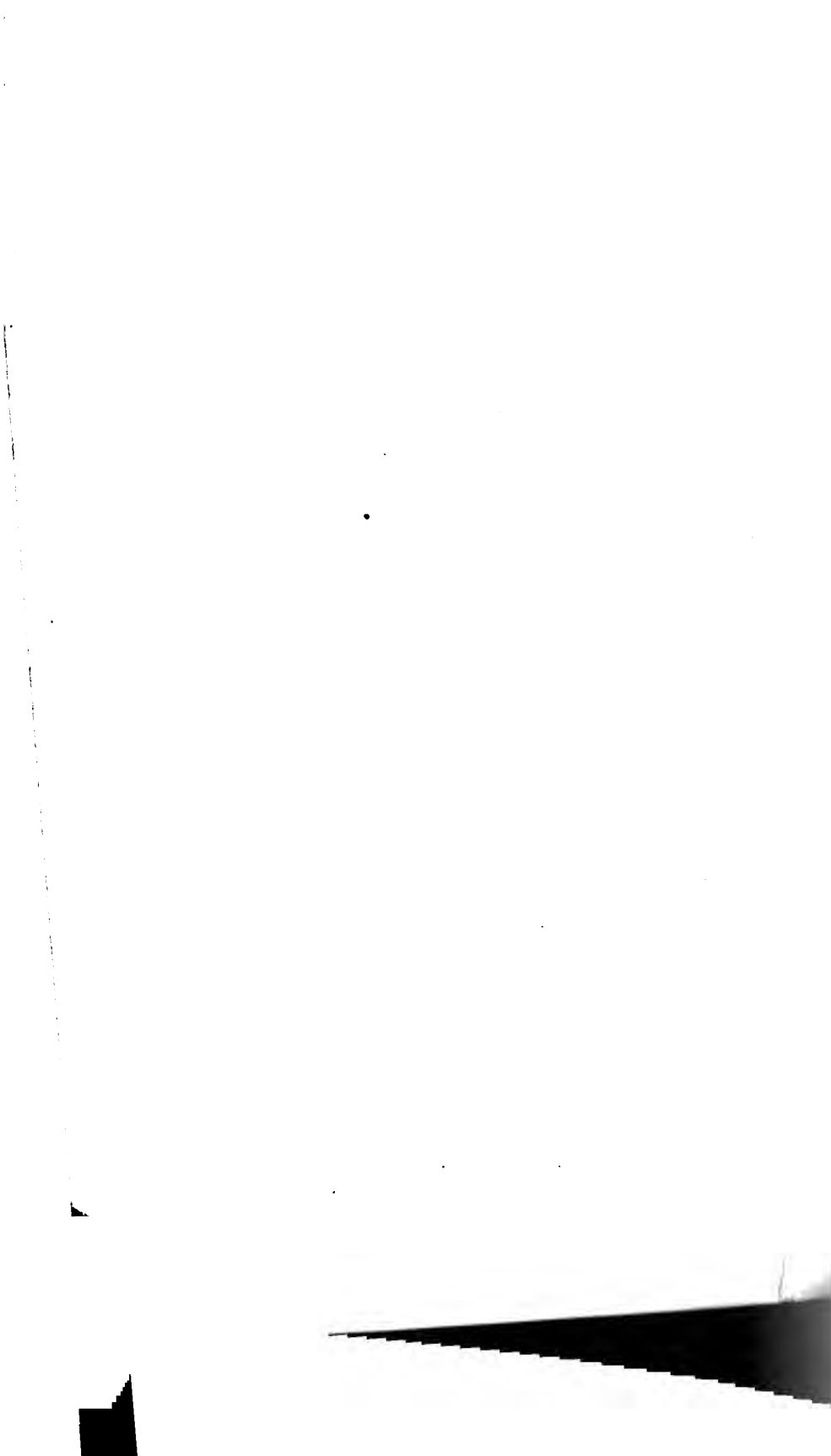
Wife is entitled to action for loss of support by injury causing husband's death, though she lived apart from her husband, if separation was not caused by her wrong. *Dallas & Wichita R. R. Co. v. Spicker* (Tex.). 160.



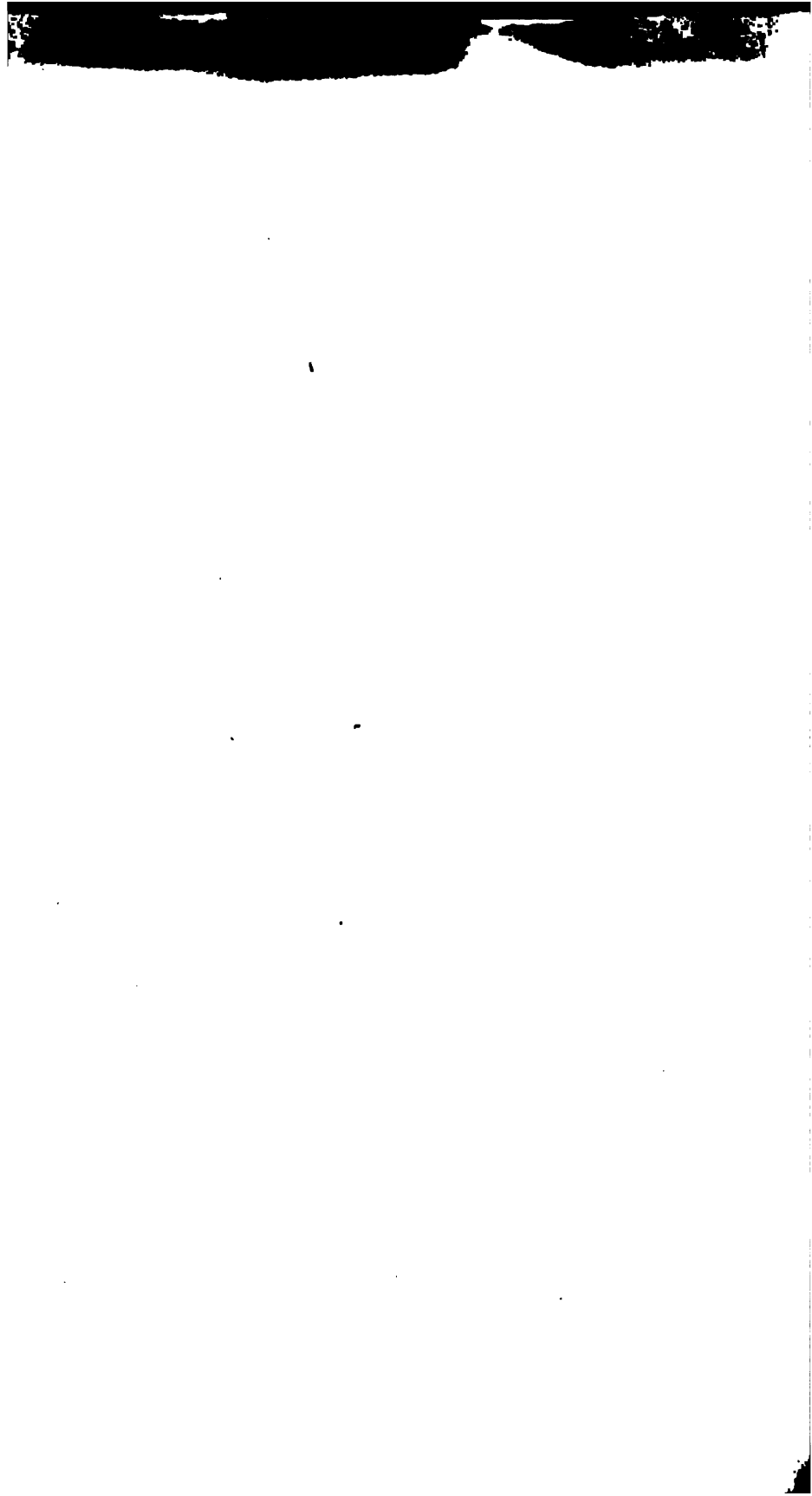


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